WHALEY
ESTATE LITIGATION

FEDERATED PRESS

INAUGURAL
ELDERLY CLEINT

JANUARY 21 AND 22, 2014, Toronto

POWERS OF ATTORNEY & UNDUE INFLUENCE: PLANNING FOR INCAPACITY - WHAT ARE THE COURTS SAYING IN 2013?

by Kimberly A. Whaley

WHALEY ESTATE LITIGATION

301-10 Alcorn Avenue

Toronto, ON M4V 3A9

Phone: 416-355-3250

kim@whaleyestatelitigation.com

www.whaleyestatelitigation.com

Table of Contents

Powers of Attorney and Undue Influence: Planning for Incapacity

Overview:

As professionals who interact with elderly or older adult clients it is imperative that lawyers, financial advisors and investment planners be educated on the use and possible abuse of power of attorney ("POA") documents. As the Canadian population ages, more and more individuals are, or should be, turning their minds to planning for potential future illness, disability, or incapacity and its impact on their financial and personal well-being. Many are executing POAs as part of their plan. We, as professionals, should be cognizant of the current issues surrounding the POA document, including its form, content, and protective qualities, as well as its potential for misuse and abuse. This paper will examine these issues as well as the prevalence of undue influence on older adults in relation to the execution of POA documents, recent POA case law, and some effective safeguards to consider in an effort to prevent potential POA legal disputes.

A. Power of Attorney Documents and Legislative Guidelines

In brief, a POA is a legal instrument that facilitates the maintenance or control over one's affairs by enabling the grantor of the power to plan for an extended absence, infirmity, and incapacity. Proper, thoughtful preparation allows the grantor of the POA to require an attorney to take legal steps to protect the grantor's interests and wishes within the confines of the governing legislation.

Overview of Ontario's POAs: Property and Personal Care

i) The Power of Attorney for Property

A POA for property can be a ***general*** form which is made in accordance with the *Powers of Attorney Act*[1], or a ***continuing*** POA for property which is made in accordance with the provisions of the *Substitute Decisions Act*[2], (the "***SDA***").

[1] *Powers of Attorney Act,* R.S.O. 1990, Chapter P. 20
[2] *Substitute Decisions Act*, S.O. 1992, Chapter 30 (the "*SDA*")

A POA for property can be used to grant:

- A specific or limited authority;
- A general authority granting the power to do all that is permissible under the governing principles and legislation; and
- A continuing authority which survives subsequent incapacity.

A continuing power of attorney for property or a "CPOAP" is commonly used to ensure that the financial affairs of an individual are looked after in circumstances where that person is unable to look after them on their own, whether temporarily, as agent, or permanently as a result of incapacity to manage property.

Pursuant to the *SDA,* a CPOAP must be executed in the presence of two witnesses. However there are restrictions on who the witnesses can or cannot be. For example, spouses or partners of the attorney or grantor are restricted from acting as witnesses.[3]

A CPOAP is valid as a continuing authority for property management if:

- The document states that it is a continuing power of attorney; or
- The document expresses the intention that the authority given may be exercised during the grantor's subsequent incapacity to manage property.[4]

Capacity to Manage Property

A person is considered incapable of managing their property if they are:

- unable to understand information that is relevant to making a decision in the management of their own property; or
- unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.[5]

[3] *SDA*, subsection 10(2).
[4] *SDA*, subsection 7(1).
[5] *SDA*, s.6.

A CPOAP document can be limited to specific dates, or contingencies, and/or it can continue during the incapacity of the grantor, hence the name *continuing* power of attorney for property.

Capacity to Grant or Revoke a CPOAP

To have a valid CPOAP, the attorney needs to be appointed *before* the grantor becomes incapable of giving it.[6] It should be noted that a person can be capable of giving or revoking a CPOAP, even if he/she is incapable of property management. The legal criteria applied in ascertaining the capacity to grant or revoke a CPOAP is often referred to as less onerous than that applied in determining the capacity to manage property[7].

Section 8 of the *SDA* legislates when a person is capable of granting a CPOAP. He or she must possess the following:

(a) Knowledge of what kind of property he or she has and its approximate value;

(b) Awareness of obligations owed to his or her dependants;

(c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

(d) Knowledge that the attorney must account for his or her dealings with the person's property;

(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;

(f) Appreciation that unless the attorney manages the property prudently its value may decline; and

(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

[6] *SDA,* subsection 9(1).

[7] For further reading on capacity see: Estates, Trusts & Pension Journal, Volume, 32, No. 3: "*Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity.*" By Kimberly Whaley and Ameena Sultan

The criteria applied to determine the capacity for revoking a CPOAP is the same as that for granting a CPOAP. Therefore, a person is capable of revoking a CPOAP if capable of granting one.[8]

If, after granting a CPOAP, the grantor subsequently becomes incapable of granting a CPOAP, the POA granted remains valid as long as the grantor had capacity at the time it was executed.[9] The *SDA* also sets out guidelines for the resignation, renunciation and termination of the CPOAP.[10]

Powers Granted under a CPOAP

The powers granted to an attorney for property acting on behalf of an incapable person are extensive. An attorney operating under a CPOAP has the power to do anything on behalf of the grantor that the grantor could do if capable, except make a last will and testament. These powers are subject to the *SDA* provisions and any court imposed conditions.[11]

It should be noted that the CPOAP is effective immediately upon signature, unless there is a provision or some sort of triggering mechanism in the document which directs that it will come into effect in accordance with a specified date or event, such as the incapacity of the grantor. If the POA document specifies that the power does not become effective until incapacity, there should be a means for determining that incapacity, failing which, the grantor and the attorney should be aware of the provisions of the legislation which offers some guidance.[12]

ii) The Power of Attorney for Personal Care

The Power of Attorney for Personal Care ("POAPC") is also made in accordance with the provisions of the *SDA.* However, unlike the CPOAP, a POAPC can be used to grant powers exercised during ***incapacity only***.

[8] *SDA*, subsection 8(2).
[9] *SDA,* subsection 9(2).
[10] *SDA,* ss.11-14.
[11] *SDA*, subsection 7(2).

A POAPC enables the individual grantor when capable, the opportunity to appoint a person or persons to make personal care decisions in the event of incapacity respecting personal care and treatment decisions. An individual or grantor is considered incapable of managing personal care if unable to understand information relevant to:

- Health care;
- Nutrition;
- Shelter;
- Clothing;
- Hygiene; or
- Safety.

The grantor is also considered incapable if unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision respecting same.[13]

Capacity to Grant or Revoke a POAPC

As with the different legal criteria for assessing capacity for managing property, and giving or revoking a CPOAP, the legislation sets out the criteria required for the capacity to make personal care decisions and to grant or revoke a POAPC. Again, the legislation specifically provides that a person may be capable of granting or revoking a POAPC even if he/she is mentally incapable of making personal-care decisions of the nature listed above.[14] The only exception to this is if the POAPC incorporates specific instructions for personal care decisions. Those instructions are only valid if, at the time the POAPC was executed, the grantor had the capacity to make the decision(s) referred to in the document.[15]

The criteria applied for determining capacity to grant or revoke a POAPC is found at section 47 of the *SDA*. A person is capable of granting a POAPC if the person has:

---

[12] *SDA*, subsection 9(3).
[13] *Health Care Consent Act,* s.4(1).
[14] *SDA*, s.47.
[15] *SDA*, subsection 47(4).

a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
b) The appreciation that the person may need to have the proposed attorney make decisions for the person.[16]

As with a CPOAP, a person who is capable of granting a POAPC is also deemed capable of revoking a POAPC.

Powers Granted Under a POAPC

When making decisions on an incapable person's behalf, the attorney for personal care is required to make decisions in accordance with the legislation. Further guidance respecting consent to treatment decisions is also found in the *Health Care Consent Act.*[17]*,* (the "*HCCA*").

An attorney must use reasonable efforts to act in accordance with the known wishes or instructions of the incapable person as ascertained while capable, or otherwise to act in the incapable person's "*best interests"* guided by the legislation and common law.

To act in the incapable person's "*best interests"* the attorney as substitute decision maker, must consider:

- the values and beliefs of the grantor in question;
- their current incapable wishes if ascertainable;
- whether the decision will improve the grantor's standard and quality of life, or otherwise either prevent it from deteriorating, or reduce the extent or rate at which the quality of the grantor's life is likely to deteriorate; and
- whether the benefit of a particular decision outweighs the risk of harm to the grantor from alternate decisions.[18]

[16] *SDA*, subsection 47(1).
[17] *The Health Care Consent Act*, 1996, S.O., 1996, Chapter 2, Schedule A
[18] *SDA*, s.61.

It should be noted that written wishes and oral wishes have equal weight, and that later capable wishes take precedence over earlier wishes.

Discussion with family members can be beneficial to the attorney, noting of course, that the attorney must ensure that the incapable person's independence is fostered. The attorney must also assist in choosing the least restrictive or intrusive courses of treatment or action. It is important to understand that an attorney for personal care is not a care provider, rather is a substitute decision maker, or assisted decision maker in that he/she provides assistance to the compromised person in making decisions.

There are limitations on who an individual grantor may appoint as an attorney pursuant to the POAPC. The legislation prohibits a person who provides health care, or residential, social, training or support services to the grantor for compensation, from acting as an attorney for personal care, unless the attorney is a spouse, partner, or relative of the grantor, in which case, they are permitted to act.[19]

Furthermore, it is important to note that granting a new POA (either for property or for personal care) cancels any previous power of attorney document and as such, before granting a new POA, a grantor should ensure that there is no pre-existing POA document that he/she wishes to keep in existence.

Drafting Lawyer's Duties

It is the responsibility of the drafting solicitor to assess a client's capacity to grant or revoke a power of attorney, either for property or for personal care.[20] Assessments of capacity to make or revoke POA need not be conducted by certified capacity assessors, although such can be completed by assessors.

---

[19] *SDA*, subsection 46(3).

[20] *Egli (Committee of) v. Egli*, 2005 CarswellBC 3014, 2005 BCCA 627, 20 E.T.R. (3d) 159, 48 B.C.L.R. (4th) 90, [2006] B.C.W.L.D. 850, [2006] B.C.W.L.D. 902, 2006] B.C.W.L.D. 900, [2006] B.C.W.L.D. 856, [2006] B.C.W.L.D. 857, 262 D.L.R. (4th) 208, 220 B.C.A.C. 148, 362 W.A.C. 148 (C.A) In this case, the trial judge placed greater weight on the evidence of the drafting solicitor than that of a physician in finding that Mr. Egli had the requisite capacity to execute the POA in question.

The message from our common law suggests that the drafting lawyer should be satisfied that his/her client has the requisite capacity to give instructions for and execute the document in question, notwithstanding a legal presumption of capacity. This duty is particularly significant if:

- a client is elderly, infirm, dependant or vulnerable;
- if the instructions vary substantially from previous instructions and governing documents (last will and testaments, trusts, POAs, etc.); or
- where the instructions are not received from the testator directly.

Lawyers are also wise to exercise additional caution in circumstances where:

- a potential beneficiary brings a client to the office and appears overly involved in the process, or
- where there exists a susceptibility to influence due to vulnerability or compromised cognition.

As issues of capacity can cause complications and significant cost consequences many years after legal services have been rendered, a lawyer is well advised to maintain careful and detailed notes when taking instructions for and drafting POAs.

Although the area of capacity is complex (and only briefly touched upon in this paper and will be addressed in more detail by another speaker), the more information a lawyer has about the state of a client's abilities and understandings, the better the protection afforded to both.

For further information on capacity and for helpful Capacity Checklists see:

www.whaleylitigation.com/resources/WEL_Capacity_Checklist_EstatePlanningContext.pdf; and chart:

http://whaleyestatelitigation.com/resources/WEL_SummaryofCapacityCriteria.pdf

Furthermore, drafting solicitors should be wary of simply using boilerplate language in a POAPC, especially in any “end-of-life” or advance directive clause that deals with the cessation of medical treatment for the grantor. POAPCs, and POAs in general, should be drafted in accordance with each client’s specific instructions and wishes. The Ontario Superior Court of Justice made this warning to drafting solicitors in the recent and notable case of ***Friedberg et al v. Korn***[21]. This case dealt with an uncertainty in the interpretation of a "prior capable wish" made in a POAPC and the interplay between a treating physician's recommendation to withdraw treatment based on the prior capable wish and the discretion and opinion of the attorneys to continue treatment based on the incapable patient's orthodox religious views.

In *Friedberg*, a devout orthodox Jewish 86 year old widow suffered from dementia, hypertension, and hyperthyroidism. Mrs. Friedberg had been living in the community with a full time caregiver, until January of 2012 when she choked on some food while in Florida and suffered cardiac arrest. She was resuscitated but had sustained an anoxic brain injury leaving her in a persistent vegetative state. She was transferred to a hospital in Toronto with a feeding tube and tracheotomy. While Mrs. Friedberg was not in extreme pain, she did not show any awareness and she required suctioning of her airway, without which she would die. After their mother's hospitalization, Mrs. Friedberg's children were notified of a POAPC executed by their mother in 2003, appointing them as her attorneys.

The POAPC contained an "end-of-life clause" which provided that if there "*is no reasonable expectation of my recovery from physical or mental disability, I be allowed to die and* ***not be kept alive by artificial or heroic measures***."

The POAPC also included a decision-making clause for her attorneys which stated: "*I authorize and direct my attorneys. . .to make on my behalf all decisions with respect to my personal care if I am mentally incapable of makings such decisions . . .namely, . . .cessation or continuation of measures whereby my life may be artificially prolonged*."

[21] *Friedberg et al. v. Korn,* 2013 ONSC 960.

The POAPC was discussed between the attorneys and the treating team at the hospital. The attorneys agreed to a "do not resuscitate" order but did not agree on the withdrawal of the treatment presently given to Mrs. Friedberg. The attorneys believed that Mrs. Friedberg's overriding wish was to grant discretion in personal care decision-making to them and that the "end-of-life" clause was contrary to Mrs. Friedberg's religious beliefs.

Due to the uncertainty regarding the scope and effect of the POAPC, Mrs. Friedberg's doctor applied to the Consent and Capacity Board ("CCB") for directions pursuant to section 35 of the *HCCA*. At the hearing, extensive evidence was presented by:

- the lawyer who drafted the POAPC for Mrs. Friedberg regarding her advice and instructions on the "end-of-life" clause;
- Mrs. Friedberg's treating physician;
- her family and friends; and
- her Rabbi, regarding her strict orthodox beliefs, including the belief that all medical interventions available to prolong life *must* be performed unless the person is in extreme pain.

The lawyer who drafted the POAPC was a specialist in the area of trusts and estates. She testified at the hearing before the CCB that she had no specific recollection of discussing with the patient the POAPC and had no specific notes in her file about the "end-of-life" clause. Instead, the drafting lawyer was able to speak about her "general practice" of completing a clause-by-clause review of all POAPCs with her clients. Her practice was to explain the "end-of-life" clause as an "expression of wishes", and advised her clients to speak to a health practitioner about "extreme measures".

However, the evidence also showed that the primary reason for the meeting was for the patient to revise her Will, and not specifically to execute a POAPC. Furthermore, the "end-of-life" clause in the POAPC was the drafting lawyer's firm's boilerplate clause that was presented to every client without prior instructions. It was presumed that the

majority of clients wanted such a provision in their POAPCs. The drafting lawyer also testified that she would not have discussed religion with her client and there were no notes in her file about her client's Orthodox Jewish faith.

Based on all of the evidence, however, the CCB found that Mrs. Friedberg's intentions and wishes, as contained in the POAPC were clear and unambiguous, and expressed a prior capable wish and that Mrs. Friedberg knew and approved of the contents of the POAPC. The CCB placed significant weight on the testimony of the drafting solicitor regarding her evidence of her general practice when advising a client who is executing a POAPC.

The attorneys successfully appealed the CCB's decision to the Ontario Superior Court of Justice. In her analysis, Justice Carole Brown reviewed the case of *Barbulov v. Cirone*,[22] which sets out the questions that the CCB must answer when faced with an inquiry of a POAPC:

> The inquiry must always remain focused on the task mandated by the statute - does this document express the capable wishes of the person with respect to treatment in particular circumstances? To conclude that the document does, the **CCB must be satisfied on the evidence that the grantor understood what he was doing through the document - i.e. he knew and approved of its contents and effects.** If he or she did not, then I do not see how one could say that the power of attorney for personal care expressed the wishes of the person with respect to treatment, as required by section 5 of the HCCA. [emphasis added]

Justice Brown opined that there was "substantial evidence" which caused her to doubt that Mrs. Friedberg understood what she was doing through her POAPC or that she knew and approved of the POAPC. This evidence included:

- the drafting lawyer's evidence pertaining to her advice and explanation of the "end-of-life" clause;
- Mrs. Friedberg's religious values;

[22] (2009) 176 A.C.W.S. (3d) 1157 (Ont.S.C.J.) ("*Barbulov*").

- the internal inconsistencies in the POAPC; and
- Mrs. Friedberg's language difficulties.[23]

Justice Brown concluded that the CCB's finding constitutes an error in law and in fact and unreasonable in its result. Her Honour ordered that the CCB's decision be quashed and that in its place the Court found that Mrs. Friedberg did not express a prior capable wish in the POAPC and therefore there was no prior capable wish applicable to her circumstance.

Warning to Drafting Solicitors

An educating aspect of this case is the commentary by the Court on the drafting solicitor's explanation and instructions on the "end-of-life" clause and the POAPC in general. The Court found that from a review of the drafting solicitor's notes the main purpose of her meeting with Mrs. Friedberg was to draft or change her Will and the POAPC was ancillary. There was no evidence that she requested a POAPC specifically. Also, the "end-of-life" clause was the drafting solicitor's firm's boilerplate clause that was presented to every client without instructions as it was presumed that the majority of her client's wanted this provision.[24] Of particular note was the fact that neither “artificial” nor “heroic measures” (the boilerplate language used in Mrs. Friedberg’s end of life clause) have a standard medical definition.[25]

At the hearing, the drafting solicitor had no personal recollection of her meeting with or instructions to Mrs. Friedberg and relied on her "general practice". Her file notes also made no reference to the "end-of-life" clause. The Court found that there was little or no evidence to suggest that Mrs. Friedberg understood the ramifications of the POAPC and end-of-life clause, and that the CCB had erred in placing significant weight on the drafting solicitor's "general practice" evidence.[26]

[23] *Friedberg*, *supra* note 57 at para. 73.
[24] *Friedberg*, at para. 82.
[25] *Friedberg*, at para. 15.
[26] *Friedberg*, at para. 89.

It is clear from this case that a POAPC should not be a simple add-on in an estate plan. The client went to her lawyer for a revised Will and also received a POAPC with an "end-of-life" clause that arguably, as was found by the court, conflicted with her religious views. The lawyer testified that she did what most diligent lawyers would do in a similar situation: a clause-by-clause explanation and review of the provisions of the POAPC. However, it appears according to the Court, that she should have done more, but how much more? The standard of care for lawyers drafting and taking instructions regarding POAPCs may arguably be broadened as a result of this case. Until we have further clarification from the courts, extensive note-taking, individually tailored clauses and less boilerplate language is the more cautious approach for drafting solicitors.

B. Undue Influence

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions including planning and testamentary documents such as POAs, where, through exertion of the influence on the mind of the donor, the mind falls short of being wholly independent. Lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to making decisions involving their estate planning and related transactions. All professionals who deal with the elderly should keep this in mind.

Application of Undue Influence

In the absence of evidence of actual and specific influence exerted to coerce a person to make a gift, the timing and circumstances of the gift may nevertheless be sufficient to prove undue influence. Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.[27]

[27] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.

In making such determinations, courts will look at whether "the potential for domination inheres in the nature of the relationship between the parties to the transfer."[28]

Relationships Where There is an Imbalance of Power

Courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power. Courts look for evidence of one party dominating another. This domination may not be actual coercion, but can be subtle influence on one party to enter into a transaction not on his or her own free will. Such evidence may satisfy a court that a planning instrument, such as a POA is not valid, due to undue influence. [29]

In cases where multiple planning instruments, such as POAs, have been drafted and executed, courts will look for a pattern of change involving a particular individual as indication that undue influence is at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.[30]

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[31] For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.[32]

---

[28] *Fountain Estate v Dorland,* 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC).
[29] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543: the Court in this case looked at the relationship between a father and his daughter at the time where he transferred his home and a sum of money to her, which relationship was one of heavy reliance by the father on his daughter.
[30] See for example *Kohut Estate v Kohut,* where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.
[31] See for example *Kohut Estate v Kohut*, *Nguyen Crawford v Crawford*, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[32] *Nguyen Crawford v Nguyen*, 2009 CarswellOn 1877; *Grewal v Bra*l, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

Other decisions where courts have found undue influence include scenarios where the funds of a grantor of a power of attorney are used as though they belong to the grantee, or where an individual hired to take care of a susceptible adult in a limited fashion extends his/her involvement to render the person powerless and dependant for personal profit/gain.[33]

Courts have found, in the context of granting powers of attorney, that the presence of undue influence coupled by a lack of independent legal advice can be sufficient to invalidate a power of attorney document even if it were found that the grantor was mentally capable of granting the power.

The Ontario Superior Court of Justice, in the 2013 decision of ***Gironda v Gironda***[34], provided a (non-exhaustive) list of indicators of undue influence:

- The testator/grantor is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- The testator/grantor is socially isolated;
- The testator/grantor has experienced recent family conflict;
- The testator/grantor has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with his or her prior Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.[35]

In ***Gironda***, an elderly widow, Caterina, was dependent on one of her four sons, Vito, who had lived at home for his entire life. At issue in the case was the validity of certain estate documents, including a Will and POA documents executed in favour of Vito in 2005, as well as the transfer of the family home into Vito's name in 2008 and all of her money to Vito in 2009. The widow's capacity at various points in time was central to the issues in the litigation. [Note all information obtained from the reported decision alone][36]

[33] *Juzumas v Baron*, 2012 ONSC 7220.
[34] *Gironda v Gironda*, 2013 ONSC 4133.
[35] *Gironda v Gironda*, 2013 ONSC 4133 at para 77.

Facts and Background

In 2003, shortly after her husband's death, Caterina started experiencing some memory loss. Caterina was seen by a doctor who was also a geriatric specialist. The doctor conducted a standard geriatric assessment (but did not conduct a specific capacity assessment) on Caterina and concluded that she had mild memory and cognitive impairment but did not have Alzheimer's disease.

In 2005, Vito testified that Caterina wished to change her Will, and Vito called a lawyer on her behalf. The lawyer advised Caterina to see her family doctor regarding her competency to make a Will. The family doctor's notes of his meeting with Caterina revealed that Caterina's mental competence was "okay!" and the doctor testified that Caterina was lucid, oriented to place and time and related to him appropriately. The family doctor also admitted however that he did not have training to conduct capacity assessments and had no experience or training in the tests for testamentary capacity or capacity to grant or revoke POAs.

After her meeting with her doctor, on June 24, 2005 Caterina executed a Will as well as a power of attorney for property and a power of attorney for personal care in favour of Vito. Caterina instructed her lawyer to draft the Will so that her home was left solely to Vito and the residue of her bank accounts to her other three sons.

In 2006, Caterina once again visited with the geriatric specialist. He noted that her cognitive symptoms increased and that she presented with mild Alzheimer's. In 2007 Caterina's family doctor noted that her symptoms worsened to the point where she had "memory blowout" which he explained as having more significant memory problems than previously recorded.

Caterina's son John testified that in 2008 she sometimes did not recognize him. However, on October 28, 2008, Caterina transferred the title in her home, her single largest asset, to Vito.

---

[36] *Gironda v Gironda*, 2013 ONSC 4133

In 2009 Caterina requested that approximately $134,500.00 be transferred from her bank account with two of her sons to an account in her own name. Those funds were eventually transferred to a joint account in Vito and Caterina's names and then into an account solely in Vito's name.

Litigation

Vito's three brothers commenced an Application against Vito alleging that Caterina lacked the capacity to:

- make a Will or grant a POA in 2005;
- gift her house to Vito in 2008; and
- transfer the money in her bank account to Vito in 2009.

The sons also argued that Vito unduly influenced Caterina to complete these transactions in his favour.

In August of 2011, an expert and geriatric psychiatrist, Dr. Shulman, was asked to complete a report in connection with the litigation addressing Caterina's current capacity and retrospective opinion on Caterina's capacity. He concluded that Caterina lacked capacity to manage property and personal care, grant or revoke POAs, to make a Will and to transfer or make gifts of substantial property since at least June 2005.

Justice Penny found that there were suspicious circumstances surrounding the execution of these legal documents as Caterina: was illiterate, did not speak English, had little financial knowledge, and was dependent upon Vito, Therefore Vito, as propounder of the Will, bore the onus of showing that Caterina knew and approved of the contents of her Will and had testamentary capacity.[37]

[37] *Gironda* at para.60.

Justice Penny found that the best evidence of Caterina's mental status in 2005 came from the two professionals who saw Caterina at that time (her family doctor and lawyer), rather than Dr. Shulman's retrospective analysis. Accordingly, the Court gave less weight to Dr. Shulman's report.[38] While the professionals were not capacity assessors, based on their notes and testimony Justice Penny found that they turned their minds to Caterina's capacity and as to whether she appeared to understand what she was doing and to be doing it of her own free will. Justice Penny noted that Caterina's family doctor:

- saw Caterina alone, in the absence of her son;
- had treated and known Caterina for many years and knew her well;
- the majority of his practice involved geriatric patients;
- he was well-positioned to comment on her cognitive status; and
- he had no concerns about the independence of her Will.[39]

Justice Penny also noted that the lawyer who drafted the 2005 Will and POAs:

- saw Caterina alone, in absence of Vito;
- his general practice with elderly clients was to engage in conversation as a means of establishing whether the testator understood what she was doing and was acting of her own free will; and
- took Caterina through the main points in the documents and satisfied himself that she understood what she was doing and signing voluntarily.[40]

Justice Penny concluded that Caterina had testamentary capacity to make the 2005 Will. His Honour went on to apply the criteria from s. 8 and s. 47 of the *SDA* (outlined above) as to whether or not Caterina had the capacity to grant the POA for property and personal care in Vito's favour. Based on the evidence provided by her family doctor and her lawyer, the Court concluded that Caterina met the criteria and was capable.

[38] *Gironda* at para. 92.
[39] *Gironda* at paras. 83-85.
[40] *Gironda* at paras. 86-88.

On the allegation of undue influence, Justice Penny found that based on the evidence above, while there were grounds for *suspicion* of undue influence surrounding the execution of the 2005 Will and POAs, Caterina was not subjected to undue influence "*of any kind sufficient to vitiate the voluntariness of her actions. Her free will was not over borne*."[41]

Justice Penny noted however that the circumstances surrounding the 2008 transfer of the family home to Vito were very different:

- there was clear evidence that Caterina had suffered significant cognitive decline;
- Vito was coaching his mother on what to say and do;
- Vito took Caterina to a lawyer she did not know; and
- Caterina did not receive independent legal advice.[42]

As Caterina's home was her largest single asset, according to the Court, the standard capacity to make a gift of this kind is high, essentially equivalent to the capacity to make a Will.[43] On the evidence the Court found that the circumstances surrounding the execution of the transfer of her home were suspicious and that Vito did not meet the high threshold showing that Caterina acted independently and with sound mind. The Court held that Caterina was incapable of transferring the property and was unduly influenced to do so.[44] The transfer of the property was accordingly, declared invalid.

Ultimately, during the trial Vito admitted that the money transferred from the joint account to an account in his name alone should be used for his mother's benefit and was the property of Caterina. His Honour opined that had he been required to resolve the dispute over the monetary gift he would have held that it was not a valid gift.[45]

[41] *Gironda* at para. 89.
[42] *Gironda* at para. 113.
[43] *Gironda* at para. 100.
[44] *Gironda* at para. 115.
[45] *Gironda* at para. 118.

The Court also concluded that at the time of the trial Caterina was a person incapable of granting or revoking POAs or making a Will. Based on evidence of Vito's explosive behaviour toward his mother and her caregivers, the Court concluded that despite the valid 2005 POAs, Vito was not an appropriate person to be Caterina's attorney or guardian. The Court appointed two of Caterina's other sons as joint guardians for Caterina, relying on sections 22 and 55 of the *SDA* which state that the court has overarching jurisdiction to appoint a guardian of property or personal care for a person who is incapable of managing property or personal care, and as a result needs decisions to be made by a person who is authorized to do so.[46]

This case provides a good overview of undue influence in a POA and estates context. For further assistance in determining undue influence see a helpful checklist at: www.whaleylitigation.com/WEL_Undue_Influence_Checklist.pdf .

C. Misuse and Abuse of Powers of Attorney

In addition to the risk of undue influence on a grantor of a POA, there is also the potential for the attorneys to misuse or abuse a POA. Attorneys appointed pursuant to power of attorney documents do not always do the job that they are supposed to do ethically and within the confines of the law.

Attorneys cannot always be trusted to act in an honest and trustworthy manner. There is an extremely high risk that a vulnerable older adult or incapable person may fall victim to abuse because of the power of attorney document, the chosen attorney, or the predatory attorney who obtains a power of attorney through abuse or deceit for exploit of purposes.

Power of attorney documents are readily available on the internet and there is no requirement therefore to engage the services of a lawyer to draft them. This means as

[46] *Gironda* at paras. 170-171.

long as the document is compliant with the legislative requirements of witnessing, then the document could be, or appear to be, a valid document.

A power of attorney document fraudulently procured from a vulnerable or physically dependent grantor by an individual with improper motives, whether through undue influence, or in suspicious circumstances, for the sole purpose of financial, exploitation, and personal gain, is a very real risk.

Similarly, even if the power of attorney document is validly granted, the attorney may make unauthorized, questionable or even speculative investment decisions. Often we see that an attorney inappropriately deals with or procures jointly held assets and accounts, having the effect of interfering with a grantor's estate plan.

Lessons from Recent Cases

Unfortunately there are a growing number of cases before the courts that deal with the misuse and abuse of POAs. Several of such cases are reviewed in papers found on topic in the "Publication Section" of my website: Link to Publications: http://whaleyestatelitigation.com/blog/published-papers-and-books/.

Some cases from 2013 are discussed below:

McMaster v. McMaster[47] tells the all too common tale of an adult child who is appointed attorney for property for his elderly mother and decides to treat her money and assets as his own.

In *McMaster* an 80 year old widow appointed her two sons as joint attorneys under a continuing power of attorney for property in 1994. Presumably, the mother thought she was making a wise decision appointing two attorneys, possibly so they could keep an eye on each other and avoid attorney misconduct. Unfortunately, for unknown reasons,

one of the sons, Graeme, was not made aware of his appointment as co-attorney. The other son, Malcolm, commenced control of his mother's financial welfare in 1994. Between 1994 and the litigation in 2013, the mother's assets went from over $5 million plus her house and cottage to almost nothing, with the mother owing back taxes on her properties. The mother was 99 years old at the time of the litigation.[48]

While Malcolm was his mother's attorney for property he:

- lived in his mother's duplex home with his wife, rent-free;
- transferred significant funds from his mother's family corporation to his own corporations;
- invested a significant amount of his mother's money into a go-kart business in Wisconsin, which was completely unsuccessful and resulted in extensive litigation;
- purchased buildings from his mother's money, sold them for a profit, then failed to return any money to his mother;
- failed to pay his mother's real property, personal and corporate taxes since 2008;
- incurred $65,000 in debt on a line of credit with CIBC in his mother's name; and
- used a business visa card in his mother's name.[49]

Graeme only became aware that he was a co-attorney in 2012 when Malcolm attempted to obtain a CHIP mortgage on his mother's home to pay off debt. Graeme commenced an application for Malcolm to be removed as attorney for breaching his duty under s.39 of the *SDA*. A collateral issue was whether there had to be a formal finding by the court of mental incapacity as a condition precedent to Malcolm's removal for breach of his duty.

Justice Whitten commented on the mother's capacity:

> Even if it were necessary in order to declare [the mother] fiscally incapable, more detailed medical evidence is necessary, what evidence exists is clearly that of an elderly

[47] 2013 ONSC 1115 ("*McMaster*").
[48] *McMaster* at paras.29-32.
[49] *McMaster* at paras.46-51.

> vulnerable person who because of her memory deficits and her "dementia" would have absolutely no ability to "understand" or "appreciate", as referenced by Wilson, J. in *McDougald Estate v. Gooderham*. **[The mother] is the embodiment of an individual who needs protection of the court, otherwise she is a pawn in the investment schemes of her son.** The concept of *parens patriae* can be relied upon by the court to critically assess pursuant to section 39(1) of the [SDA] to assess the stewardship of Malcolm. **Malcolm's management of his mother's fortune does not present as being in satisfaction of his duty to manage those substantial funds for [his mother's] benefit, or to preserve a fund for her cause. Those objectives appear to have been completely lost**.[50] [emphasis added]

Justice Whitten ordered that Malcolm be removed as attorney under a Continuing Power of Attorney for Property of his mother and his brother was appointed in his place, stating: "*The fiscal stewardship of Malcolm has been a disaster for his mother. He has literally blown through at least $2,000,000.00. If there was ever a case for removal of an attorney this is it. It will prevent further haemorrhaging of his mother's assets*."[51]

What is unfortunate about this case is the fact that much of this dispute and loss of the mother's substantial assets might possibly have been avoided had Graeme known that he indeed was a joint attorney with his brother. This just emphasizes the importance of advising clients to discuss their testamentary and planning documents with their friends and family, especially those appointed as attorneys.

The case of ***Blair v. Reijers et al***[52] deals with another common scenario in POA disputes: sibling rivalry over an elderly parent's personal and/or financial care.

Facts

In *Blair*, a daughter commenced an "urgent" application before the courts to have her elderly mother declared incapable of managing her property and personal care and for the daughter to be appointed as guardian in both instances. At the initial "urgent" hearing in June of 2012, the Court appointed the daughter as interim guardian. However, the daughter failed to serve any of her siblings with the application, nor her

[50] *McMaster* at paras.56-57.
[51] *McMaster* at para. 63.
[52] *Blair v. Reijers et al,* 2013 ONSC 4279 ("*Blair*").

mother. Accordingly, the Court ordered the daughter to serve the application on her family as well as the Office of the Public Guardian and Trustee (the "PGT"). The daughter, however, more importantly also failed to advise the Court that the mother had already executed a POA for Property and a POA for Personal Care in 2005 appointing the daughter and her brother as co-attorneys.

Moreover, the appointee attorneys under the POAs were also unknown to the rest of the family and to the PGT who had been previously appointed as guardian of the mother's property when she was admitted to a hospital in April of 2012. It is unclear if the daughter advised the court of this appointment as well.

In an appearance before Justice Greer on May 13, 2013, the daughter's siblings brought a cross application seeking an order removing their sister as interim guardian as well as removing her as an attorney under the 2005 POAs. They also made allegations of elder abuse against their sister, with evidence of the mother having severe bruises and a broken wrist. The sister did not deny the allegations.[53]

Her Honour held that the sister's application for guardianship must be dismissed based on the existence of the 2005 POAs. She also found that based on the son and daughter's appointments as co-attorneys under the 2005 POAs it was evident that the mother always wanted more than one attorney.[54]

The PGT, however, was currently acting as the statutory guardian of Helena and Her Honour found that the 2005 POAs had not been activated. Notably, pursuant to Rule 1.04 of the *Rules of Civil Procedure*, which states that the rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on it merits, Justice Greer held that the court had the power to find that:

[53] *Blair* at para. 17.
[54] Blair at para. 15.

- the daughter was not an appropriate person to act as guardian for property or personal care;
- the daughter should be removed as co-attorney for property and personal care to be replaced by other siblings; and
- That the new attorneys may take the appropriate steps (set out in s.16.1(1) of the *SDA*) to have the PGT's statutory guardianship terminated.[55]

Costs Warning

A warning aspect of this case to individuals considering POA litigation is the corresponding costs decision.[56] Justice Greer ordered that the daughter to pay the costs of her siblings and the PGT personally on a substantial indemnity basis in the total amount of over $75,000.00. Her Honour based this finding on the daughter's "scandalous conduct" throughout the proceedings including:

- her propensity to dismiss her counsel on the eve of an application or motion;
- her failure to obey court orders made against her;
- allegations made against her of elder abuse; and
- her removal of Helena's household goods without authority.[57]

Another recent case that examines the costs of a POA dispute is that of ***Wercholoz v. Tonelloto***.[58] While this case was in fact a ruling on costs based on a settlement of the issues outside of court, Justice Glithero nevertheless canvassed the background and facts of the dispute prior to providing a costs judgment.

Facts

In this case an elderly mother named two of her four children, a son and a daughter, as joint powers of attorney for property in 1994.

From 2006 to 2010 the son had not been in contact with his mother.

[55] *Blair* at para.31-32.
[56] 2013 ONSC 6021.
[57] 2013 ONSC 6021 at para. 10-11.

In March of 2010, the mother's house was sold with the attorneys signing the sale documentation and the mother moved into a retirement home.

In July of 2010, unbeknownst to the son, the mother executed a new power of attorney naming the daughter and her daughter's husband as joint attorneys and removing the son. The mother had also decided that she did not want to live in the retirement home anymore and wanted to move in with her daughter.

After learning about the new POA from an investment advisor in August of 2010 the son commenced an Application against his sister seeking 23 different heads of relief.

The primary issue was the determination of who would act as attorney or guardian of the mother's property and personal care. The son brought an *ex parte* motion which resulted in an order that temporarily suspended the POAs granted to the daughter and her husband and appointed the son as acting attorney with some limitations. The son made no attempts to speak to his siblings about the POAs or to work out a settlement of the issues before commencing litigation.

In November 2010, the mother was assessed for capacity and the assessor concluded that the mother did not have the mental capacity to execute a POA for property or to manage property but that she could execute a POA for personal care, and that she was incapable of instructing counsel.[59]

During the litigation the son, as acting attorney, was very uncooperative. For example:

- The daughter had been looking after her mother for 24hrs a day for almost two years and requested respite assistance so she could have a break. The son ignored the request initially and only several months later agreed to the request;

[58] 2013 ONSC 1106 ("*Wercholoz*").
[59] *Wercholoz* at para.13.

- When the daughter would request funds from the mother's accounts to pay for ordinary day-to-day living expenses the son would agree and then change his mind;
- He challenged the need for hearing aids for his mother and their expense; and
- He hired an accountant for his mother's finances when the daughter had already advised him that the mother had an accountant who was 5-6 times cheaper.

The Court also found that the son had made several unfounded, "serious" and "hurtful" allegations which required the daughter to prepare significant materials in response to the application.

Eventually the application settled on the grounds that the original 1994 POA appointing both son and daughter as attorneys would be declared valid. This settlement only occurred after multiple settlement offers were rejected by the son as he wanted to act as sole attorney.

In deciding the costs award, Justice Glithero opined that "*this case represents a sad example of the hefty amounts that can be spent by siblings who choose to litigate rather than negotiate their differences in respect of a parent's wellbeing*".[60]

His Honour noted that had the daughter advised the son that his mother was drafting new POAs and had the son spoken with his sister before he commenced litigation that it was "*highly likely that most of these issues could have been resolved in a less combative and less costly manner. . .Certainly when viewed from [the mother's] perspective, and what was in her best interests, the commencement of these proceedings and the bringing of the ex parte motion escalated the contest in a manner inconsistent with [the mother's] best interests*".[61]

[60] *Wercholoz* at para. 37.
[61] *Wercholoz* at para. 39.

Ultimately, after reviewing the factors set out in Rule 57 of the *Rules of Civil Procedure* the Court ordered the son to pay costs on a substantial indemnity basis of $40,000.00 to the daughter. The daughter sought the remainder of her costs to come from her mother's funds. However the Court found that "*much of the effort and costs spent on litigation here were not of benefit to [the mother], I decline to order that the balance of [the daughter's] costs be paid out of her assets*."[62]

For other examples of civil cases, while not as recent but still provide an overview of possible misuses and abuses of POAs (including examples of undue influence, adult children pilfering their parent's money, forged POA documents, lack of independent legal advice etc.), please see: *Covello v. Sturina;*[63] *Dhillon v. Dhillon;*[64] *Nguyen-Crawford v. Nguyen,*[65] *Johnson v. Huchkewich*,[66] *Fiacco v. Lombardi,*[67] *Bishop v. Bishop,*[68] *Grewal v. Bral,*[69] *Chu v. Chang,*[70] *Woolner v. D'Abreau,*[71] *Zimmerman v. McMichael Estate,*[72] *and Ziskos v. Miksche.*[73]

Criminal Cases

The misuse and abuse of a POA can also be in violation of the *Criminal Code of Canada* R.S.C., 1985, c. C.46 ("*CCC*"). Section 331 of the *CCC* sets out the offence of *Theft by a Person Holding a Power of Attorney*.

The 2011 case of *R. v. Kaziuk*[74] (discussed below) touches on this offence, however the accused was charged under the regular theft and fraud provisions. He had also

[62] *Wercholoz* at para. 61.
[63] 2007 CarswellOnt 3726 (SCJ).
[64] 2006 CarswellBC 3200 (C.A.).
[65] 2010 CarswellOnt 9492 (SCJ).
[66] 2010 CarswellOnt 8157 (SCJ).
[67] 2009 CarswellOnt 5188 (SCJ)
[68] 2006 CarswellOnt 5377.
[69] 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[70] *Chu v. Chang* (2009), 2009 CarswellOnt 7246 (Ont. S.C.J.); *Chu v. Chang*, 2010 CarswellOnt 246, (Ont. S.C.J. Jan 12, 2010); *Chu v. Chang*, 2010 CarswellOnt 1765, (Ont. S.C.J. Mar 26, 2010), 2010 CarswellOnt 4507 (Ont. S.C.J.), 2011 CarswellOnt 1840 (Ont. C.A.).
[71] 2009 CarswellOnt 664 (Ont. S.C.J. Feb 10, 2009); Leave to appeal allowed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6480 (Ont. Div. Ct. Aug 10, 2009); AND Reversed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6479 (Ont. Div. Ct. Sep 29, 2009).
[72] 2010 CarswellOnt 5179, 57 E.T.R. (3d) 241, 2010 ONSC 3855 (Ont. S.C.J.).
[73] 2007 CarswellOnt 7162.
[74] 2011 ONCJ 851 ("*Kaziuk*").

originally been charged with committing a "*Criminal Breach of Trust*". Ultimately this charge was dismissed at the request of the Crown "on the basis that the wrong section of the Criminal Code had been laid. The offence should have been laid under s. 331, theft by a person holding a Power of Attorney."[75] At the conclusion of the trial Justice Baldwin "found that the s.331 offence had been proven by the Crown beyond a reasonable doubt" and that even though the accused was not charged with this offence it was an "aggravating sentencing factor pursuant to s.725(1)(c) of the Criminal Code".[76]

Facts

In ***R. v. Kaziuk***,[77] the son of an eighty-eight year old widow depleted his mother's assets by misusing and abusing a POA for Property which his mother had executed in his favour. The widow went from owning three mortgage free properties including a residence in Miami, Florida, as well as significant savings in her bank account of over one million dollars to living in a homeless shelter run by the Salvation Army without a penny to her name. The son had used the POA to transfer his mother's fortune into his name to pay off significant debt that he had accumulated.

Before the trial, Mrs. Kaziuk provided a sworn videotaped statement to a police officer stating that she never gave permission to her son Roman to use her money in the manner that he did. However, Mrs. Kaziuk recanted her statement and at trial testified that she did indeed give permission. Due to physical ailments (significant eyesight and hearing decline), Mrs. Kaziuk was unable to adopt her sworn statement to the police at the trial. The Court allowed the videotaped statement into evidence based on the principled exception to the hearsay rule. The Court also noted that Mrs. Kaziuk recanted her statement after visiting the accused in jail. The Court found that Mrs. Kaziuk had been influenced by the accused to falsely reconstruct the events in question. Mrs. Kaziuk also appeared "fixated on the idea that everyone in her world, except for [the son was] out to take all her money."[78]

[75] *Kaziuk* at para. 2.
[76] *Kaziuk* at para. 3.
[77] 2011 ONCJ 851.
[78] *Kaziuk* at para. 77.

Even though the Crown only sought a total sentence of 3-4 year's incarceration, Justice Baldwin sentenced Kaziuk to the maximum 10 year sentence for the theft over $5000.00 charge and a concurrent 10 year sentence for the fraud charge. Justice Baldwin found the following aggravating factors on sentencing:

- "This was a despicable breach of trust fraud as the offender was, at the time, the Power of Attorney to the victim." (para. 85)
- "Not even the notorious fraudster Bernie Madoff was guilty of destroying his own mother as Mr. Kaziuk has repeatedly done." (para. 101)
- "Mr. Kaziuk would rip-off the wings of all the angels in heaven and sell them to the devil for his own gain if he could." (para. 96)
- "Mrs. Kaziuk is homeless due to the offender's actions. He has wiped her out financially and broken her heart." (para. 89)
- "In jail, this offender will be better off physically than his own Mother. He will be sheltered, fed regularly and kept warm." (para. 102)

While the theft and fraud perpetrated against the accused's own mother in this case is severe, it is highly unlikely that this fact pattern is unique. A stiff maximum penalty as imposed by Justice Baldwin hopefully will act as a deterrent to attorneys under POAs from abusing their position of trust.

Protecting Canada's Senior's Act

Notably, in 2013 the "*Protecting Canada's Senior's Act*"[79] came into force which amended the *Criminal Code* such that evidence that an offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation, is an aggravating factor to be taken into account during sentencing for a crime.[80] In other words, if the victim is a vulnerable older adult, this will be a significant factor in determining the potential sentence for a perpetrator of POA

[79] *Protecting Canada's Senior's Act, S.C. 2012, c.29*
[80] *Protecting Canada's Seniors Act*, S.C. 2012, c.29.

fraud or abuse. Hopefully, this will also lead to stricter sentences and further deterrence for potential POA abusers of the elderly and the vulnerable.

D. Avoiding Litigation

While the first step in avoiding POA litigation is to be aware of the potential for abuse and misuse of such documents, there are further steps that you and your clients can take to avoid long and difficult POA disputes. A few considerations are outlined below:

i) Selecting the Right Attorney:

The most important advice that we as professionals can give a potential grantor of a CPOAP or a POAPC is to carefully choose their attorney(s). In addition, much emphasis should be placed on the fact that the most important characteristics that one should look for in a would-be attorney are: honesty, integrity, and accountability.

A grantor must be able to trust implicitly the person(s) that they choose to appoint as attorney(s). The grantor should have full and frank discussions with the chosen attorney to advise them that they have been chosen as an attorney and to make them aware of what the expectations are. While children may be the first people grantors think of when drafting POAs they are not always the best choice as attorneys.

The *SDA* requires that an attorney be over the age of 18 in order to exercise decisional authority.[81] Before naming an attorney in a POA document, it is recommended to consult the person in question and ensure that he or she is willing to act. Some individuals will choose to appoint a trust company as an attorney. Such companies perform the services of an attorney for a fee. They are sometimes preferred to individuals as they are able to dispense their services impartially and are held to a standard of professional accountability.

[81] *SDA,* s. 5.

It is possible, but not necessary, to appoint more than one attorney to act jointly and/or severally. This means that a grantor could appoint two or more attorneys to make decisions together, or enable each attorney to act separately on their behalf. Unless it is specified in the POA document that attorneys are allowed to act separately, statutory law assumes that jointly appointed attorneys must make decisions together.[82]

It is also possible to assign different responsibilities to separate attorneys.[83] You can also assign one attorney to act on your behalf and a substitute attorney to act for you should death or another event prevent the attorney first named to act.[84] It is important, when deciding whether to appoint more than one attorney, to consider any potential for conflict between the attorneys. Any conflict down the road can lead to delay in decision-making or even lengthy and expensive litigation that is counter to a grantor's personal and financial well-being. Often attorneys cannot easily work together as seen in some of the cases discussed above. That is why it is so important to consider who the attorney or attorneys will be.

Although the Public Guardian and Trustee ("PGT") may act as an attorney of last resort in certain cases, it is important to note that the PGT cannot be named in a POA document unless the PGT's approval is obtained beforehand.[85]

ii) Tailor the POAs to Your Client's Needs*:*

It is important that POA documents are tailored to clients' specific needs and requirements. Substantively, as long as your client's wishes do not run afoul of the legislative requirements, anything can be drafted into the POA document that they wish to see happen. In fact, the more guidance given, and clarity provided, the better for the

[82] *SDA,* s. 7(4), 46(4).
[83] *SDA,* at s. 7(6), 46(7).
[84] Ministry of the Attorney General, "Powers of Attorney", online: Ministry of the Attorney General < http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>; see *SDA, supra* note 2 at s. 7(2) and 46(2).
[85] Ministry of the Attorney General, "Powers of Attorney", online: Ministry of the Attorney General < http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>.

prevention of future litigation and for guidance to the attorney managing the grantor's affairs.

Often, these documents are simply drafted in accordance with a precedent, perhaps obtained online from the Ministry of the Attorney General website. However, these documents can be used to draft and provide for substantive provisions with respect to financial management, including tax and trust planning. It is important to seek proper legal and financial advice. For a POA to be particularly useful, it should but often does not contain detailed instructions. The instructions must be drafted clearly and concisely. Furthermore, drafting solicitors should take note of the warning made by the Court in *Friedberg*, discussed above, for the possible negative consequences of using boilerplate language.

iii) Seek Appropriate Legal Advice

While POA documents are available online, it is extremely important that proper legal advice is sought when deciding to execute either a POAPC or CPOAP. While some clients may balk at the costs associated with a properly drafted POA, money spent up front can prevent much more costly litigation down the road.

Concluding Comments

The POA is a powerful tool to assist the older adult plan for future illness or incapacity. As outlined above, however, great responsibility comes with being appointed an attorney and unfortunately not everyone is suited for such a role. It is important to encourage our clients to have open and honest dialogue with family members and loved ones in order to prevent long and costly disputes. However, even with careful planning fraud and abuse do happen. As seen from the cases outlined above, the courts continue to intervene with stronger sentences and stricter cost consequences which will

in turn hopefully deter any would-be abusers and fraudsters and will lead to better protection of the vulnerable[86].

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Case reviews are based on reported decisions. Please visit our new website at http://www.whaleyestatelitigation.com

Kimberly A. Whaley *January 2014*

[86] See POA Checklists at: http://whaleyestatelitigation.com/blog/checklists-for-attorneys-and-guardians/; and http://navigatinglaterlife.com/