

POWER OF ATTORNEY PITFALLS

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I. Introduction

In this paper, I raise concerns that the estate planning solicitor might consider when providing recommendations to clients on Power of Attorney documents. With an aging population, and increased life expectancy, incapacity is more than ever a part of life. As professional advisors, part of our service and obligation to our clients is to anticipate the consequences of estate planning on the family and to assist clients in tailoring their particular planning needs to their particular family dynamics, or where there is no family, making the individual's planning protection effective for the future. Careful, considered and creative planning equally will help to assist in planning protectively to avoid family conflict and, in turn, costly and senseless litigation. Solicitors can effectively assist their clients in avoiding litigation and in their protection when elderly, or incapable. Solicitors and planners, indeed the public at large, should also be alert to the possibility of fraudulently obtained Powers of Attorney and the risk to the vulnerable, elderly, dependant, and incapable.

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Solicitors seeking to provide their clients with the tools for conflict avoidance should consider Justice Cullity's remarks in *Stern v. Stern*² on the current realities of estate litigation prior to the death of an incapable person:

The court should not, I think, close its eyes to the fact that litigation among expectant heirs is no longer deferred as a matter of course until the death of an incapable person. While, in law, the beneficiaries under a will, or an intestacy, of an elderly incapable person obtain no interest in that person's property until his, or her, death, the reality is that very often their expectant interests can only be defeated by the disappearance, or dissipation, of such property before the death.³

II. Legislative Framework

In Ontario, it is the *Substitute Decisions Act*⁴, S.O. 1992, c.30 (the "SDA") that defines incapacity (and capacity) to grant a continuing power of attorney for property and a power of attorney for personal care. The tests for incapacity to grant a continuing power of attorney – either for property or for personal care - are clearly distinct from the test for testamentary capacity to make a Will. Where a person is incapable to grant a Power of Attorney and has not granted a valid Power of Attorney in the past, a guardianship application may be required to ensure that property and personal care needs are met.

Prior to the proclamation of the *SDA* on April 3, 1995, it was the *Mental Incompetency Act*⁵ that applied to declarations of incapacity. The *SDA* provides for additional rights and obligations with respect to mentally incapable adults. The legislation provides a framework for people to make choices in advance of incapacity with respect to personal care and property.

² 2003 CanLII 6193 (Ont. Sup. Ct.)

³ *Ibid.* at para. 28.

⁴ *Substitute Decisions Act*. S.O. 1992, c.30

Under the Ontario legislation, there are two distinct tests for granting a Power of Attorney for property and one for personal care.

Property

A person is capable of giving another individual the power to deal with his or her property if s/he:

- (a) knows what kind of property he or she has and its approximate value;
- (b) is aware of obligations owed to his or her dependants;
- (c) knows 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) knows that the attorney must account for his or her dealings with the person's property;
- (e) knows that he or she may, if capable, revoke the continuing power of attorney;
- (f) appreciates that unless the attorney manages the property prudently its value may decline; and
- (g) appreciates the possibility that the attorney could misuse the authority given to him or her. ⁶

⁵*Mental Incompetency Act*, R.S.O. 1990, c.M.9.

⁶*Substitute Decisions Act*, S.O. 1992, s. 8(1).

The test for granting and revoking a Power of Attorney for property are one and the same.⁷

The legislation is also explicit that someone may be capable of giving a power of attorney for property even if s/he is incapable of managing property at that time.⁸ That is, there are distinct tests for capacity to grant and capacity to manage one's own property.

Personal Care

The test defined by the statute for granting a Power of Attorney for personal care is substantially distinct. Someone can give a Power of Attorney for personal care if s/he

- (a) Has the ability to understand that the proposed attorney has a genuine concern for the person's welfare; and
- (b) Appreciates that the person may need to have the proposed attorney make decisions for the person.⁹

Where the Power of Attorney for personal care document includes specific provisions, yet another test for capacity applies: here, the person must also have the capacity to understand the special provisions.¹⁰

Whether or not one is able to manage one's own personal care is a distinct question from the question as to capacity to grant a power of attorney for personal care.

Section 66 outlines the duties of both guardians and attorneys for personal care, including decisions with respect to the *Health Care Consent Act*.¹¹ Where a person is acting further to a

⁷ *Substitute Decisions Act*. S.O. 1992, s. 8(2).

⁸ *Substitute Decisions Act*. S.O. 1992 s..9(1).

⁹ *Substitute Decisions Act*. S.O. 1992 s..47(1).

power of attorney for personal care, decisions are to be made with a view to the incapable person's wishes where known, or otherwise in accordance with the incapable person's best interests as defined by the Act.¹²

The Court has authority to make an order for directions where questions arise in the course of carrying out the duties under a power of attorney or in the course of acting as a guardian.¹³

III. Power of Attorney Abuses

Certainly in my practice, I am seeing an ever-increasing number of POA disputes and complaints.

An overview of the sorts of issues I see arising in our practice concerning Attorneys, both for Personal Care and Property, are as follows:

- (1) Disputes and accounting discrepancies concerning the specific dates upon which the POA document became effective; the date of incapacity of the grantor; and the extent of the Attorney's involvement;
- (2) Disputes regarding whether it was the grantor, or the Attorney, who was acting at any given stage;
- (3) Whether the Attorney has made unauthorized, questionable or even speculative investment decisions, or decisions or decisions lacking in diversity;
- (4) Whether the Attorney has taken into consideration the tax effects of the Attorney's action or inaction;
- (5) Whether the Attorney has acted in a timely fashion in attending to financial matters which may have contributed to unnecessary expenses, or damages from inaction;
- (6) Whether the Attorney has sought professional advice where deemed necessary or appropriate;
- (7) The Attorney's treatment of and dealings under jointly held assets or accounts;

¹⁰ *Substitute Decisions Act*. S.O. 1992 s. 50.

¹¹ *Health Care Consent Act, 1996*, S.O. 1996, c. 2

¹² *Substitute Decisions Act*. S.O. 1992 s.66.

- (8) Attorney disputes between siblings regarding the capacity\incapacity, action\inactions, of a parent\grantor;
- (9) Attorney disputes among step-children, children of prior relationships, subsequent spouse\partner;
- (10) Attorney misappropriation of grantor's assets;
- (11) Attorneys acting ultra vires their power to effect testamentary acts;
- (12) Incapacity of a grantor to grant a POA;
- (13) POA obtained from incapable or vulnerable grantor by an individual with improper motives, seeking personal gain, as a result of the exerting of undue influences, or suspicious circumstances;
- (14) Fraudulently obtained Powers of Attorney;
- (15) Forged Power of Attorney documents;
- (16) Powers of Attorney used to perpetrate a fraud;
- (17) Disputes where one or several Attorneys have acted without the knowledge or approval of the others either under a Joint, or Joint and Several, POA.

Some of these issues arise as a result of the Attorney giving such issues secondary attention, since in all likelihood the focus of their attention has been directed to the care and interests of the grantor. However, an Attorney's inattention to the sorts of duties and responsibilities expected can cause a multitude of problems later on, particularly in an area where family emotions run high. In other circumstances, Powers of Attorney documents are procured purposely for fraudulent purposes.

IV. Guardianship – A Remedy?

When problems arise with POAs, the court-appointment of a guardian is often sought as a remedy.

V. Fraud

¹³ *Substitute Decisions Act*, S.O. 1992 s., 68.

The use of fraudulently obtained POAs is an increasing concern. Elderly individuals in particular are highly susceptible to such fraud. Identity theft and hence fraud arising as a result is also on the rise. Fraudsters seeking monies from scams are also seeing our elderly and most vulnerable targeted. The incidence of mortgage fraud by means of fraudulent POAs has risen sharply in recent years.

The most common forms of title fraud involve fraudsters using stolen identities or forged documents to transfer a registered owner's title to himself or herself without the registered owner's knowledge. The fraudster then obtains a mortgage on this property and once the funds are advanced on the mortgage, he or she disappears. This type of fraud is also sometimes referred to as a "mortgage fraud."

However, fraud can also be the product of validly executed powers of attorney. You should always ensure that your client knows the duties and responsibilities under a Power of Attorney. That is, once a Power of Attorney is signed, the chosen Attorney has immediate ability to sign the grantor's name and make financial decisions for him or her.

In the U.S., 80,000 cases of Financial Fraud with respect to elderly victims were reported in 2005.¹⁴ More than two thirds of the victims were defrauded by someone close to them. In the United States, Congress is currently considering versions of a comprehensive bill called the Elder Justice Act, which would fund public education, better data collection, and training for law enforcement and elder care professionals to combat the problem of elder fraud. Some states already have programs that work closely with social service agencies and banks to teach

¹⁴ Business Week, June 2006, http://www.businessweek.com/magazine/content/06_23/b3987113.htm.

individuals how to recognize fraud and report it. In addition to ensuring that a lawyer drafts a carefully worded POA agreement excluding any provisions for the attorney to make gifts to him or herself where appropriate, enlisting the help of the elder individual's financial institution can also prove helpful. A local bank branch is often uniquely positioned to notice suspicious activity early on. Financial advisor, or accountants are also often well placed to be alerted to those issues as well.

Fraud and the Land Titles Act

In the fall of 2006, the provincial government introduced Bill 15, which proposed updates to Consumer protection. This Bill received royal assent on December 20th, 2006. Accordingly, the *Land Titles Act* has now been amended to help ensure that ownership of a property cannot be lost as a result of the registration of a falsified mortgage, fraudulent sale or a counterfeit power of attorney. The amendments made by 2006, c. 35, Sched. C, s. 58 came into force on August 20th, 2007.

The *Land Titles Act*, R.S.O. 1990, c. L.5 defines a "fraudulent instrument" as an instrument,

- (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,
- (b) that is given under the purported authority of a power of attorney that is forged,
- (c) that is a transfer of a charge where the charge is given by a fraudulent person, or
- (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument; ("acte frauduleux")

The Act now entitles an individual to compensation from the Assurance Fund where s/he has been wrongfully deprived of some estate or interest in land and has done his or her due diligence as specified by the Direction (s.4). However, there is no compensation where the claimant was negligent or where the person knowingly participated in or colluded in the fraud

(s.59). According to s.15, if it appears to the Director of Titles that a registered instrument may be fraudulent, the Director of Titles may of his or her own accord and without affidavit enter a caution to prevent dealing with the registered land. The Act also now creates an exception such that a registered instrument **is not deemed** to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register **if** it is a fraudulent instrument registered on or after October 19, 2006 (s.78 (4.1)). Subject to the Act, a fraudulent instrument that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner (s.155). According to s. 156, a person is guilty of an offence if the person fraudulently procures or attempts to fraudulently procure a fraudulent entry on the register, an erasure or deletion from the register or an alteration of the register. The penalty for fraud under this section is a fine of not more than \$50,000 or imprisonment for a term of not more than two years less a day, or both, if the person is an individual; and a fine of not more than \$250,000, if the person is a corporation.

Fraud and the Criminal Code

Section 331 of the Canadian Criminal Code provides as follows:

331. Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney.

R.S., c. C-34, s. 291.

Sections 386-388, which cover fraud may also be applicable in certain instances.

Relevant Recent Case law

In the recent case of *Dhillon v. Dhillon*¹⁵ the B.C. court of appeal affirmed the trial judge's finding of fraud on the part of a wife and son. In that case, while a husband was living in India, his wife and son used a forged power of attorney to sell residential property that the husband owned, and used another forged power of attorney to withdraw funds from the husband's RRSP and bank account. The wife used the proceeds from the sale of the first house to purchase two subsequent houses. At trial, the wife and son were found jointly and severally liable for the sale of the first house, and the wife was found liable for withdrawals from the husband's accounts. The husband was awarded damages in the amount of \$75,324.91 for the sale of house A payable jointly and severally by the wife and son, \$15,226.78 for the sale of house B payable jointly by wife and son, constructive trust in house C, and \$12,540.77 for RRSP withdrawals. The husband was further awarded \$5,000 in punitive damages, and special costs at 80 percent of solicitor-client costs. The Court of appeal found that the trial judge did not overcompensate the husband by failing to limit his award to extent of his loss. They found that the trial judge did not err by ordering punitive damages against the wife and son nor in exercising his discretion to make an order for special costs in addition to an award of punitive damages. The court did, find however that a stay of execution on remedies granted for unjust enrichment was appropriate given that the trial judge did not consider the division of family

¹⁵ 2006 BCCA 524.

assets and debts pursuant to Family Relations Act.

In *Bishop v. Bishop*¹⁶ Justice O’Neill of the Superior Court found a power of attorney granted to an elderly woman’s son *void ab initio* based on medical evidence that she did not have capacity to grant a continuing power of attorney to her son at the time that she did. Alma Bishop gave her son a continuing power of attorney in 2005. The medical evidence included a score of 22/30 on the mini-mental health status test administered by her family physician and a diagnosis of mild Alzheimer disease. Allegations of fraud and abuse however were held to be unfounded.

In *CIBC Mortgages Inc. v. Chan*¹⁷, Ontario Superior Court Justice Thea Herman ruled that “once registered” the two mortgages were “effective and can be relied on”, that is, they are enforceable where the lender was unaware of the fraud. In that case, the defendants were a husband and wife who were joint tenants of home. The wife forged the husband's signature on a power of attorney while the husband was out of country and used the POA to obtain lines of credit from the plaintiff lenders secured by mortgages on the home. The mortgages were registered pursuant to the *Land Titles Act*. When the mortgages went into default, the lenders brought action against the husband and wife for principal and interest due, as well as possession of the home. The husband and wife brought a counterclaim on the basis that mortgages based on a forged power of attorney were void. Justice Herman granted the lenders' motion for summary judgment and the husband's and wife's motion for summary judgment was dismissed. It was held that, once registered, mortgages were effective and could be relied on as they were given for valuable consideration and without notice of fraud. This decision was based on Justice

¹⁶ 2006 WL 2583842.

¹⁷ (2004), 6 R.F.L. (6th) 73.

Herman's interpretation of the application of ss.155 and 78(4) of the Land Titles Act. The Ontario Court of Appeal affirmed her decision in *Household Corp. Realty and Liu and Chan v. CIBC*, 261 D.L.R. (4th) 679.

However, in the recent decision of *Lawrence v. Maple Trust Company*¹⁸, Justice Gillese speaking for the court found that the result in *Household Realty*, at least in respect of the husband's interest in the property, was inconsistent with the theory of deferred indefeasibility preferred by the court. It was further held that the language in *Household Realty* failed to recognize that the Land Titles Act gives statutory effect to the theory of deferred indefeasibility. For these reasons, the court found both the reasoning and the result in *Household Realty* to be incorrect.

Instead, the Ontario Court of Appeal in that case held as follows at para. 67:

The theory of deferred indefeasibility accords with the Act and must be taken into consideration in an analysis of s. 155 and its relationship with other provisions in the Act. Under this theory, the party acquiring an interest in land from the party responsible for the fraud (the "intermediate owner") is vulnerable to a claim from the true owner because the intermediate owner had an opportunity to avoid the fraud. However, any subsequent purchaser or encumbrancer (the "deferred owner") has no such opportunity. Therefore, in accord with s. 78(4) and the theory of deferred indefeasibility, the deferred owner acquires an interest in the property that is good as against all the world.

Looked at in combination, these recent decisions suggest that where a power of attorney is fraudulently or otherwise improperly obtained (for example, where the grantor is found incapable at the time that the POA is given), the innocent individual is not without recourse. The Ontario Court of Appeal's decision in *Maple Trust v. Lawrence* supports the deferred

indefeasibility doctrine and affords protection to the claim of the true owner of property even in the face of an innocent intermediate owner. Where the true owner has been wronged by the operation of a fraudulent or improperly obtained power of attorney, the law may provide some protection. Of course anyone alleging this would still face the burden of proving the initial fraudulent or improper power of attorney.

Future Legislative Directions

Alan Silverstein, a bencher with the Law Society of Upper Canada and a certified specialist in real estate law, wrote in the Law Times earlier this year that mortgage fraud should be made a specific criminal offence with a mandatory minimum penalty and restricting access to Ontario's land titles registry. According to him, "We have very specific laws under the Criminal Code against branding cattle fraudulently and obtaining food and lodging fraudulently. If we can protect cattle and innkeepers, why can't we protect homeowners?" Silverstein has noted that under the Georgia Residential Mortgage Fraud Act, a person commits an offence, "with the intent to defraud," if he or she makes, uses, or facilitates the use of a "deliberate misstatement, misrepresentation, or omission during the mortgage lending process" to mislead lenders or borrowers; "receives any proceeds or any other funds in connection with a residential mortgage closing" resulting from the above; or files with the official registrar of deeds of any county in the state "any document such person knows to contain a deliberate misstatement, misrepresentation, or omission." Anyone convicted of such fraud affecting one residence faces imprisonment with a minimum term of one year to a maximum of 10 years, or a fine not to exceed US\$5,000 fine, or both.

¹⁸ 2007 ONCA 74.

It is worthwhile noting that the U.K. has certain safeguards in place with respect to the granting of POAs that do not exist in Canada:

It appears to me from a comparison of the English legislation considered in *Re K* and the B.C. statute that the English legislative regime contains more safeguards than is the case with our legislation. As Hoffman J. observed, "the exercise of the power is thus hedged about on all sides with statutory protection for the donor". But under our statute, the power can continue indefinitely, even after mental incapacity is present, and will only terminate when a committee is appointed. The possibility of abuse by a donee is then greater than would seem possible under the English legislation. For that reason, I think it would be appropriate to be cautious in considering English precedents such as *Re K*.¹⁹

In October 2007, The New Court of Protection was established as a result of the Mental Health Capacity Act, 2005. The Court of Protection Rules, 2007, also came into effect in October 2007. The Mental Health Act, 2007, received Royal Assent July 19, 2007. The regime includes an Independent Mental Capacity Advocate Service, Code of Practice, and The Criminal Offences of ill-treatment and neglect. It will be interesting to watch whether this new regime succeeds in decreasing the abuses arising concerning, the elderly and incapable.

The U.K. also saw the repealing of the Enduring Powers of Attorney Act 1985, and the coming into force of The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.

Careful study of the new case law arising out of this new legislation may give us an indication of the success achieved.

The model is certainly worth considering in light of the foregoing problems and issues which are now endemic in our society.

¹⁹ *Egli v. Egli*, *supra* note 38 at para. 32.

The implementation of a similar regime in Canada might be a useful avenue to explore.

IV. Guidelines for Third Parties where POAs are Questionable

At the least, a power of attorney should be scrutinized for irregularities on its face. Always ensure that it was signed by two witnesses, and that there are not clear suspicious circumstances such as that it was witnessed in another country or only very recently.

It is likely prudent also to contact the donor of the power of attorney to confirm that he or she has in fact granted the power of attorney to the individual in question.

The case of *Reviczky v. Meleknia; Caplan (Intervenor)*²⁰ is the first to interpret the *Laurence v. Maple Trust Company* decision discussed above, and will likely have a tremendous impact on how third parties, and in particular banks, real estate agents, lawyers and so on treat transactions involving a power of attorney.

In that case, Justice John Macdonald of the Ontario Superior Court voided an HSBC Bank's mortgage on the basis that the solicitor retained by the bank did not sufficiently scrutinize the power of attorney document to ascertain whether or not it was valid. In the opinion of His Honour, the bank's solicitor "had the opportunity to avoid the fraud".

The facts of the case were as follows. An elderly man, age 88, living in North York, Paul Reviczky, owned residential property on which HSBC had a charge. A fraudster acting pursuant to a fictitious power of attorney and posing as a relative of Mr. Reviczky purposed to sell Mr. Reviczky's property to Mr. Meleknia. The lawyer representing the fraudulent seller sent a copy

²⁰ 2007 Canlii 56494 (On S.C.).

of the forged power of attorney to the lawyer acting for both the purchaser and the Bank. Both lawyers were unaware that the document was a fake.

However, the power of attorney displayed a date only one month before the transaction closed, and it stated on its face that the donor of the power of attorney was over 88 years old, that the power could be revoked at any time, and that it was valid until the donor's death. The power of attorney was witnessed by only one person, instead of the two required by the *Substitute Decisions Act*.

Justice MacDonald suggested that the Bank's solicitor should have made inquiries as to whether the donor was still alive, had ever revoked the power of attorney, or was mentally competent when the power of attorney was signed. The lack of proper witnessing might also have been questioned.

The transfer in Mr. Melenknia's favour was struck from the parcel register pursuant to a consent order. Mr. Reviczky applied for a declaration that the bank's charge was not valid. His application was allowed. Justice Macdonald relied on the theory of deferred indefeasibility as his rationale for allocating loss among victims of fraud who are competing holders of interests in property pursuant to the Land Titles Act. It appears from this decision that opportunity to avoid fraud is central to a theory of deferred indefeasibility. The bank had the opportunity to avoid the fraud and therefore, its interest in property was defeasible in favour of the true owner.

The lesson to be learned from this case for third parties, such as banks and lawyers, dealing with power of attorney documents is that all reasonable precautions must be taken such that it cannot be said that the opportunity was there, but not taken, to discover and avoid the fraud. Look for tell-tale signs on the face of the power of attorney document itself, and take steps to contact the donor and verify the authenticity of the document.

In a follow-up to the *Reviczky* case, Justice Kiteley in *Khosla v. Korea Exchange Bank of Canada*²¹ heard a motion for summary judgment brought by the solicitor who acted for the purchaser, Mr. Meleknia, who purchased the property from the fraudster claiming to act on a power of attorney from Paul Reviczky. While Mr. Khoslas was aware that the vendor was selling through a power of attorney, he did not requisition proof of authenticity and validity. After the transaction closed, HSBC Bank Canada advanced funds to Mr. Khosla who deposited them into his trust account at the Royal Bank of Canada.

The fraudster had opened an account at the Korea Exchange Bank of Canada (KEBOC) in Mr. Reviczky's name, forged his signature and deposited the cheque to the account. KBOC sought and obtained verification from the Royal Bank regarding the certified cheque before accepting it for deposit. KEBOC was not privy to any of the details of the transaction. The fraudster withdrew the monies from KEBOC before the fraud was discovered.

The issue on the motion was conversion. Relying on ss.20(5), 39 and 165(3) of the Bills of Exchange Act, Justice Kiteley held as follows at para. 29:

Absence of fault by the collecting bank, the presence of due diligence and the presence of contributory negligence on the part of the drawer are irrelevant. Even if I accept for purposes of the motion that Kholsa was in a better position than KBOC to detect the fraud and that KEBOC exercised due diligence, KEBOC's defences to the claim of conversion cannot succeed. KBOC is strictly liable to Khosla for conversion. There are no genuine issues for trial.

²¹ 2008 CarswellOnt 6454.

Practical Warnings to Lawyers who draft POAs

Exercise Caution:

The granting of a POA must be carefully considered. A POA is a powerful document which enables an attorney to do virtually anything on the grantor's behalf in respect of property that the grantor could do if capable, except make a Will.²² In other words, an Attorney could mortgage or sell a grantor's home without the grantor's knowledge or consent, notwithstanding any fiduciary duty attached to the Power granted.

A grantor should consider carefully the choice of Attorney, if there should be more than one Attorney, and be cognizant of any potential for undue influence.

Part of avoiding POA conflicts and litigation is to think through the family dynamics of a particular situation or indeed, the lack of family, and to implement safeguards from abuse based on the financial life circumstances of the grantor. Tailoring the POA document to the grantor's needs necessarily includes discussion of the family's circumstances, the age of the proposed Attorney, a possible substitute Attorney, and whether it is appropriate that there be more than one Attorney. What exactly does the grantor want? Who can be trusted to act as the grantor's Attorney? What compensation will the Attorney receive? How is the compensation to be calculated? Is the grantor familiar with the *SDA* legislation? Is the Attorney sufficiently familiar with the *SDA* legislation?

A great deal of POA litigation, particularly amongst siblings could be avoided if Attorneys were properly advised as to their very strict fiduciary duties, obligations and limitations. Quite often Attorneys are not aware of their statutory obligations in acting in accordance with the guidelines provided by the *SDA*.

Accountability may, in certain situations, be better achieved where there are two or more jointly appointed Attorneys. Of course, this is dependent on the circumstances of the particular

²² *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 7(2)

grantor, but would provide a “checks and balances” system, so to speak, so as to help to avoid abuse where there might be a vulnerability to it.

Similarly, as a solicitor, when taking instructions from a grantor giving a POA, it is prudent to take the time to assess whether or not there are any family members who might be more appropriately suited to assuming the role of an Attorney, particularly where there is a friend, neighbour or caregiver that has taken steps to obtain the POA of a particular person.

Consideration should be given as to whether or not a capacity assessment should be conducted. The issue of incapacity necessarily raises the question of exploitation of vulnerable persons. Many elderly people are predisposed to vulnerability if they are dependent on another for certain necessities of life. Such dependence may be attributable to physical or mental disability, or simply to the overwhelming task of suddenly managing all of their own affairs. Where a fiduciary relationship between two persons exists in the legal sense, the relationship of trust or confidence gives rise to an equitable duty of faithfulness, fidelity and loyalty.

In a British Columbia Supreme Court of Canada case, *Hodgkinson v. Simms*²³, the dissenting Judges, Sopinka and McLachlin, considered the notion of “vulnerability” in the context of fiduciary relationships. This lengthy case raises issues concerning whether a fiduciary duty arises and what it entails. I refer you to the Judgment for comprehensive review of the law of fiduciaries. According to Sopinka and McLachlin JJ at pg. 136, referring to the judgment of Wilson J, in *Frame v. Smith*²⁴, the meaning of vulnerability is,

“the scope for the exercise of...discretion or power” in the fiduciary and to the power of the fiduciary to “unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests”.

Wilson J. also referred to the beneficiaries as,

“at the mercy” of the fiduciary...Vulnerability, in this broad sense, may be seen as encompassing all three characteristics of the fiduciary relationship mentioned in *Frame v. Smith* (*set out below*). It comports the notion, not only of weakness in the dependent party, but of a relationship in which one party is in the power of the other...vulnerability

²³ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377

²⁴ *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136

does not mean merely “weak” or “weaker” it connotes a relationship of dependency, and “implicit dependency” by the beneficiary on the fiduciary.”

Justice Wilson in *Frame v Smith* identified the following typical characteristics of a fiduciary relationship:

- (1) The fiduciary has scope for the exercise of some discretion or power;
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests;
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretionary power.

The decision in *Re Koch*²⁵ is a clear illustration of how “vulnerability” may arise in respect of physical, rather than mental, circumstances. The decision also illustrates that “vulnerability” can exist whether or not there is a fiduciary relationship. *Re Koch* is an appeal case from the Consent and Capacity Board. An excerpt from Justice Quinn’s decision at para.69:

The assessor\evaluator must be alive to an informant harbouring improper motives. Higgins should have done more than merely accept the complaint of the husband, coupled with the medical reports (the shortcomings of which are chronicled above), before charging ahead with his interview of the appellant. Since the parties were separated and represented by lawyers, Higgins must have realized that matrimonial issues were in the process of being litigated or negotiated and that a finding of incapacity could have significant impact on those procedures. He should have ensured that the husband’s lawyer was aware of the complaint of incapacity. More importantly, Higgins should not have proceeded to interview the appellant without securing her waiver of notice to her lawyer.

The physical impairment suffered by Ms. Koch in these proceedings was Multiple Sclerosis. Vulnerability is not necessarily limited to the elderly or those with physical or mental impairments but can also arise as a result of other circumstances. There are a whole host of other cases which can be referenced in this regard.

Assessing Mental Capacity:

The *SDA* sets out stringent guidelines regarding requirements for capacity to grant Powers of Attorney, which are discussed below. There are different assessments, or tests and

²⁵ *Re Koch* (1997), 33 O.R. (3d) 485.

requirements for capacity depending on the required task. For instance, the capacity required to prepare a Will is different than that to prepare a POA. Mental incapacity is often sought by fraudsters as a tool instrumental in abuse.

The solicitor drafting a Will, POA or testamentary document, has a legal obligation to make some assessment of a client's mental capacity. Lawyers, however, for the most part are not trained to undertake such tasks and this is particularly so in cases where incapacity is not obvious.

In *Hall v. Bennett*²⁶, the defendant solicitor was found negligent by the trial judge for failing to draft a will because he was unsure that there was the requisite capacity. Speaking for the Ontario Court of Appeal, Charron J.A. (as she then was) concluded at para. 12 that the trial judge's approach to liability was flawed:

...the relevant question with respect to testamentary capacity was not whether Bennett [the deceased] in fact was capable of making a will but whether a reasonable and prudent solicitor in Federick's [the solicitor's] position could have concluded that he did not. As it turned out, this crucial question...was never addressed by the trial judge. Hence, as I will explain, it is my view that the trial judge's mischaracterization of the issues led him into error.

The Court also found that the absence of a retainer will usually be determinative with respect to the question of whether a duty of care is owed:

...there can be no liability in contract for the negligent performance of services that a solicitor never undertook to perform...insofar as [tortious liability] is concerned, in the absence of a retainer there would have to be other circumstances that gave rise to a duty of care...there is no suggestion of the reliance [being] foreseeable and reasonable...insofar as potential liability and negligence to a third party is concerned, the existence of a duty of care, will depend on the presence of both foreseeability and proximity...absent exceptional circumstances, it is my view that there would be insufficient proximity between the parties to give rise to a duty of care...

Aside from issues of capacity, solicitors should also be aware of questions of suspicious circumstances and undue influence that can apply equally to POA situations as well as the

drafting and execution of Wills.²⁷ However, as the Ontario Court of Appeal recently affirmed in *Knox v. Burton*, 2004 CanLII 35099, the presumption is in favour of capacity. That is, in the absence of suspicious circumstances, the onus is on the one asserting incapacity to prove this on a balance of probabilities.

It may be wise to consider making the power of attorney time limited and to keep its terms as narrow as possible within the scope of the client's particular needs and the purposes to which he or she is intending to put the power of attorney.

If the donee of the power of attorney proposes to take the donor's property for himself or herself, this should raise a bright red warning flag.

VI. Concluding Remarks

Coping properly with your professional duties is often difficult when POA disputes arise. Offer clients information sheets and checklists summarizing the Power of Attorney documents and legislation. Keep careful notes.

We should all also be vigilant about the fraudulent possibilities that attach to powers of attorney. We should ensure that our clients are clear on all the duties and responsibilities that attach to the granting of a power of attorney. If there is any reason to suspect that a certain individual may make for an inappropriate attorney, this should be discussed with your client. In the case of fraudulently obtained powers of attorney, the police should be notified and involved once you have evidence of such fraud.

POA disasters are all too prevalent today. As advisors we must be aware of the far reaching consequences of this area, the potential minefield of things that can go wrong, as well

²⁶ *Hall v. Bennett Estate* (2003), 227 D.L.R. (4th) 263.

²⁷ *Banks v. Goodfellow*, (1870), L.R. 5 Q.B. 549; *Scott v. Cousins*, [2001] 37 E.T.R. (2d) 113, [2001] O.J. No. 19 (Ont. S.C.J.); *Ostrander v. Black* [1996] O.J.; *Vout v. Hay* [1995] 2 S.C.R.; *Banton v. Banton* (1998), 164 D.L.R. to name but a few

as ensuring familiarity with the legislation and case law in order to competently advise our clients. These concerns apply to us whether we are solicitors addressing a client's concerns at first instance, or barristers litigating after the fact.

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.

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