ELDER LAW & THE POWER OF ATTORNEY: MISUSE, ABUSE, AND FRAUD

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Prepared for:

ELDER LAW ISSUES: AN INTRODUCTION TO KEY ISSUES AND INSIGHTS FOR YOUR PRACTICE

CBA NEWFOUNDLAND & LABRADOR BRANCH

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I. Introduction

Abuse and misuse by an individual, fiduciary, or otherwise, involving powers of attorney can be a form of elder abuse, and both are a growing societal phenomenon. Elder abuse often involves vulnerable individuals who may be exploited or manipulated by those entrusted with their care or management of their financial affairs. The National Initiative for Care of the Elderly ("NICE") defines elder abuse as "...actions/behaviors or lack of actions/behaviors that cause harm or risk of harm within a trust relationship."[1] Such behaviors can take many forms, for example, physical abuse, sexual abuse, emotional/psychological abuse, financial/material abuse, and/or neglect. The primary focus of this paper is financial abuse, defined as "an action or lack of action with respect to material possessions, funds, assets, property, or legal documents, that is unauthorized, or coerced, or a misuse of legal authority,"[2] involving the use of a power of attorney.

A Power of attorney ("POA") is a legal tool designed to grant, to chosen individuals, the power/authority to make decisions on behalf of an individual who is unable to do so themselves, temporarily, or permanently and often due to some type of disability, illness, or incapacity. When these powers are abused, whether through coercion, fraud, appropriation, or negligence, such misuse/abuse can lead to financial devastation. An overview of the misuse and abuse of powers of attorney in the elder law context, court treatment, and potential legal remedies is explored within.

A practice checklist is included as an appendix to this paper, providing a list of red-flags of elder abuse, and practical steps to consider taking if there are any signs of abuse. While the focus is on Ontario statutory law, case law from across Canada is also addressed, providing a broad overview of recent court treatment of common scenarios.

[1] NICE – National Initiative for Care of the Elderly
[2] *Ibid*.

II. Overview: Power of Attorney Disputes

The authority granted by a POA is broad and can encompass a wide range of financial, legal, and personal decisions. That said, the flexibility of POAS allows for various interpretations of what actions an attorney is permitted to take, leading to potential conflicts over how that authority is exercised. Disagreements can arise over the scope of the attorney's powers, the grantor's intent, whether the attorney is acting *ultra vires* the authority granted, or in breach of fiduciary duties and obligations, and even whether acting in the incapable person's best interests and quality of life considerations. Additionally, POA disputes often involve sensitive, complex family dynamics, where multiple parties may have differing views of what constitutes proper care or management of a person's affairs.

An overview of the types of issues that may arise concerning POAS both for personal care and property include the following:

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) Incapacity of a grantor to grant a POA;
3) Fraudulently obtained, or forged power of attorney documents;
4) Financial reporting and related issues;
5) Sharing an older adults' home without paying a fair share of the expenses;
6) Disputes regarding whether it was the grantor, or the attorney, who was acting at any given time;
7) Whether the attorney has made unauthorized, questionable or even speculative investment decisions, or investment decisions lacking in diversity;
8) Whether the attorney has taken into consideration the tax effects of the attorney's action or inaction;

9) Whether the attorney has acted in a timely fashion in attending to financial matters which may have contributed to unnecessary expenses, or damages;
10) Whether the attorney has sought professional advice where deemed necessary or appropriate;
11) The attorney's dealings with jointly held assets or accounts;
12) Misappropriation/appropriation of the grantor's assets;
13) Unduly pressuring the grantor to sell property, make or change a will, or to make "gifts";
14) Attorneys acting *ultra vires* their powers granted;
15) 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 in suspicious circumstances;
16) Powers of Attorney used to perpetrate a fraud; and,
17) Disputes where one or several attorneys have acted without the knowledge or approval of the others either under a joint, or even joint and several power of attorney.

III. Types of POAS, Capacity, and Duties

A Power of Attorney is an instrument that facilitates the maintenance of control over one's affairs by an agent. Proper preparation allows the grantor of a POA to require an attorney to take legal steps to protect the grantor's interests and wishes. The POA is governed by statues, common law principles, agency law, and the law of fiduciaries. Although most POAS contain standard provisions and language, POAS can be tailored to the specific wishes and direction of the grantor and should therefore be carefully reviewed and considered in every case. A POA could be used to grant time limited authority or limited to only certain authorities or specified decisions.

A POA at its core is an agency relationship between the grantor and the attorney acting under the POA. An attorney has been specifically defined in jurisprudence as:

> An instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds

> of acts on behalf of the principal. An instrument authorizing another to act as one's agent or attorney.[3]

At common law, a general power of attorney terminates upon the grantor's subsequent mental incapacity or death. The common law relating to powers of attorney has, however, been supplanted in Ontario by statute. POAS are now governed by the *Powers of Attorney Act* (the "*POAA*"),[4] and, the *Substitute Decisions Act, 1992* (the "*SDA*").[5] The *SDA* is a comprehensive statute which governs, among other things, all aspects of continuing powers of attorney for property, and powers of attorney for personal care.[6] In order to understand how POAS work in the province of Ontario, it is important to understand the legal obligations they impose at law on those parties acting as attorneys under the POA.

In the seminal decision of *Banton v Banton*, Justice Cullity stated the following with respect to the relationship created between a grantor and the attorney acting under a POA:

> An attorney for a donor who has mental capacity to deal with property is merely an agent and, notwithstanding the fact that the power may be conferred in general terms, the attorney's primary responsibility in such a case is to carry out the instructions of the donor as principal. As an agent, such an attorney owes fiduciary duties to the donor, but these are pale in comparison with those of an attorney holding a continuing power when the donor has lost capacity to manage property. In such a case, the attorney does not receive instructions from the donor except to the extent that they are written into the instrument conferring the power. The attorney must make decisions on behalf of the donor and, pursuant to sections 32 and 38 of the *Substitute Decisions Act*, he or she is a "…fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit." The status of such an attorney is much closer to that of a trustee than an agent of the donor. This has been the case since the *Powers of Attorney Act* was amended in 1979 to permit the creation of such powers. It is now made explicit in the provisions of the *Substitute Decisions Act*…[7]

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[3] *Leung Estate v Leung*, 2001 CarswellOnt 1972 at para 7.
[4] RSO 1990, c. P. 20.
[5] SO, 1992, c.30.
[6] *Spar Roofing & Metal Supplies Limited v Glynn*, 2016 ONCA 296 at paras 50 and 51.
[7] 1998 CarswellOnt 3423 at para 151.

(i) Types of Powers of Attorney

In Ontario, there are three types of powers of attorney. There is a power of attorney executed under the *POAA*, a power of attorney for personal care under the *SDA* ("POAPC") and a continuing power of attorney for property under the *SDA* ("CPOAP").

A CPOAP under the *SDA* is differentiated from a general power of attorney for property under the *POAA*, in that a continuing power of attorney survives the incapacity of the grantor. Specifically, the continuing power of attorney for property must state that it is a continuing power of attorney, or that it is intended to be used during the grantor's subsequent incapacity to manage property.[8] Notably, with respect to powers of attorney under the *POAA*, the powers do not continue into legal incapacity of the grantor. In other words, once the grantor loses capacity, the attorney under power of attorney governed by the *POAA* can no longer exercise the powers granted.

Continuing Power of Attorney for Property

A CPOAP is defined in the *SDA* as such if,

(a) it states that it is a continuing power of attorney; or

(b) it expresses the intention that the authority given may be exercised during the grantor's incapacity to manage property."[9]

A CPOAP drafted in accordance with the *SDA* survives the mental incapacity of the grantor, hence the terminology "continuing."

More than one person can be named as an attorney in a CPOAP; however, the attorneys shall act jointly unless the CPOAP provides otherwise.[10] This means that, unless otherwise stated, one attorney cannot act without the participation, and knowledge of other attorney(s). The CPOAP must be executed in the presence of, and signed by two witnesses who are at least 18 years of age. A witness cannot be:

- the attorney or the attorney's spouse or partner;

[8] *SDA*, *supra* note 5 at s 7.
[9] *SDA*, *supra* note 5 at s 7(1).
[10] *SDA, supra* note 5 at s 7(4).

- the grantor's spouse or partner;
- a child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child; or
- a person whose property is under guardianship or who has a guardian of the person.[11]

A CPOAP is effective immediately upon signing, unless it includes a provision that requires it to become effective upon the occurrence of a specific day or event. If any of the legislated criteria are not complied with, the CPOAP is not effective unless the court is satisfied, on any person's application, that it is in the interests of the grantor or the grantor's dependents to declare it to be effective.[12]

Power of Attorney for Personal Care

The POAPC requirements are set out in section 46 of the *SDA*. Notably, this type of document is more of a flexible vehicle for assisting the grantor with personal care decisions when and if it becomes necessary to do so, but also consent to treatment decisions.

A POAPC is never used except in circumstances where the grantor is incapable of making a decision.[13] The *SDA* prohibits people who provide health care for compensation or residential, social, or support services to a grantor from taking compensation for acting as an attorney for personal care except insofar as the person is the spouse, partner or relative of the grantor.[14] The POAPC can apply to decisions concerning health care, nutrition, shelter, clothing, hygiene or safety and those under the *Health Care Consent Act, 1996*.

The *SDA* provides guidance regarding the execution of a POAPC revocation, resignation, and termination.[15]

[11] *SDA, supra* note 5 at s 10(2).
[12] *SDA*, *supra* note 5 at s 10(4).
[13] *SDA*, *supra* note 5 at s 49.
[14] *SDA*, *supra* note 5 at s 46(3).
[15] *SDA*, *supra* note 5 at ss 48-53.

(ii) Capacity

There is no single legal definition of capacity. The *SDA* defines "capable" as "mentally capable" and provides that "capacity" has a corresponding meaning. Generally, all individuals are deemed to be capable of making decisions at law; that presumption stands unless and until it is legally rebutted.[16] Capacity is decision, time, and situation specific. This means that a person may be capable with respect to some decisions, at different times, and under differing circumstances. Therefore, an individual is not globally "capable" or "incapable"; instead, capacity is determined on a case-by-case basis in relation to a specific task or decision at a moment in time. Notably, the capacity required to grant a CPOAP is different than that required to manage property; that is, a person may be capable of granting a CPOAP, but, incapable of managing property.[17]

Capacity to Grant a CPOAP

The capacity to grant a CPOAP comprises both the capacity to decide whether to delegate decisions about property and the capacity to understand the power of attorney document, including the authority it confers.[18] Section 8 of the *SDA* lists the factors that should be considered when determining whether an individual possesses the requisite capacity to delegate decisions about property.

A person is capable of granting a CPOAP if that person:

1. knows the kind of property they own and its approximate value;
2. knows of obligations owed to dependents;
3. knows that the attorney will be able to do on their behalf anything in respect of property that one could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
4. knows that the attorney must account for all dealings with the person's property;

[16] *Palahnuk v Palahnuk Estate*, [2006] OJ No 5304 (SC).

[17] Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity, Kimberly Whaley and Ameena Sultan, ETPJ, Vol. 32, No. 3, May 2013.

[18] *Nguyen-Crawford v Nguyen*, 2010 ONSC 6836 at para 74.

5. knows that, if capable, the grantor can revoke the continuing power of attorney;
6. appreciates that unless the attorney manages the property prudently, its value may decline; and
7. appreciates that the attorney could misuse the authority granted.[19]

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid as long as the grantor had the capacity at the time it was executed.[20] Notably, there is a distinction between the capacity to grant or revoke a CPOAP and determining the requisite decisional capacity to manage property. It should also be noted that a CPOAP can be determined to be invalid not only for lack of capacity, but also for reasons of undue influence, which principles apply similarly to POA situations as well as Will drafting preparation and execution.[21] For example, in *Rudin-Brown et al v Brown,* the court held that the POA was invalid since it was executed under suspicious circumstances in respect of both capacity and undue influence.[22] The evidence of suspicious circumstances in the case included that the grantor was having memory issues at the time, lived with the named attorney, the documents were a significant change from earlier documents, and, after visiting two law firms, the named attorney downloaded free forms from the internet and the grantor did not receive any legal advice in their execution.

In *Nguyen-Crawford v Nguyen*, the Ontario Superior Court of Justice found that since the grantor did not speak English, and there was an absence of evidence that the POA and legal advice relating to it were translated for the grantor by someone other than the person being granted the power, there was no basis for concluding that the grantor

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[19] *SDA, supra* note 5 at s 8.

[20] *SDA, supra* note 5 at s 9(2).

[21] See *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 (SCJ); *Ostrander v Black* [1996] O.J.; *Vout v Hay* [1995] 2 SCR; *Banton v Banton* (1998), 164 DLR, *Murphy v Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v Schwartz*, 10 DLR (3d) 15. 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A.; *Hall v Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4th) 263; *Bourne v Bourne Estate* (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.); *Key v Key* [2010] EWHC 408 (ch.) (BailII); *Laszlo v Lawton*, 2013 BCSC 305, *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543, *Wingrove v Wingrove* (1885) 11 PD 81 at 82; *Shrader v Shrader*, [2013] EWHC 466 (ch); *Gironda v Gironda*, 2013 CarswellOnt 8612; *Tate v Gueguegirre* 2015 ONSC 844 (Div. Ct.).

22 *Rudin-Brown et al v Brown,* 2021 ONSC 3366.

had the specific capacity, that being the understanding of the nature of the document and the authority conferred, to execute it.[23]

In *Abrams v Abrams*, an application was brought for an order that the applicant's mother and father be assessed as to their capacity to grant a POA. Several affidavits and medical reports were filed on behalf of the mother alleging she had capacity as well as opposing affidavits and testimony that she did not. Justice Brown, with respect to the issue of capacity to grant a POA, clarified that while the person may be incapable with respect to some decisions, they still may have the capacity to grant or revoke a POA.[24]

Capacity to Grant a POAPC

A person has capacity to grant a POAPC if having the ability to understand whether the proposed attorney has a genuine concern for the grantor's welfare and also appreciates that the attorney may be making decisions for the person.[25] Where the POAPC contains a treatment direction, such as, "I do not want antipsychotic medications," the grantor must be capable of making that treatment decision at the time the POAPC is executed. Capacity to make treatment decisions is governed by the *Health Care Consent Act*,[26] while capacity for personal care is governed by the *SDA*.[27]

It is the responsibility of the solicitor who drafts the CPOAP and/or the POAPC to address the client's capacity to grant or revoke a power of attorney, which must not be confused with the grantor's capacity to manage property.[28] In making this capacity determination, a solicitor may encourage or suggest a formal capacity assessment, conducted by a certified capacity assessor, in borderline cases. Aside from issues of capacity, solicitors should also be aware of suspicious circumstances and undue influence as factors to consider in their retainer.

[23] *Nguyen-Crawford v Nguyen*, 2010 ONSC 6836, paras. 73-74
[24] *Abrams v Abrams*, 2009 CanLII 12798 (ON SCDC), para. 34.
[25] *SDA, supra* note 5 at s 47(1).
[26] *Health Care Consent Act, 1996,* SO 1996, c. 2, Sched A. at s 4(1).
[27] *SDA, supra* note 5 at s 45.
[28] *Egli v Egli*, 2005 BCCA 627.

(iii) Duties and Obligations

Duties, Standard of Care, and Liability of a Power of Attorney for Property

A person is considered incapable of managing property if unable to understand information that is relevant to making a decision in the management of one's own property or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.[29] Once the granter is incapable of managing one's own property, the attorney may begin to act.

Pursuant to the *SDA*, attorneys for property are legislatively defined as fiduciaries in carrying out their duties and powers.[30] Specifically, the *SDA* holds that an attorney for property is, "a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty, and integrity and in good faith, for the incapable person's benefit."[31] The *SDA* provides for the duties and requirements for the decision-making process, including the following:

- That an attorney must consider the incapable person's comfort, well-being, and personal care needs. For example, an attorney for property's decision to retain a lawyer for her incapable mother with respect to her personal care was held by the court to have been made for her mother's benefit and so was in accordance with this duty owed;[32]
- An attorney for property must seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person;[33]
- An attorney must consult from time to time with supportive family members and friends of the incapable person who are in regular personal contact with the incapable person, as well as the persons from whom the incapable person receives personal care;[34]

[29] *SDA, supra* note 5 at s 6.
[30] *SDA, supra* note 5 at ss. 32, 38, 66 and 67.
[31] *SDA, supra* note 5 at ss 32(1) and 38.
[32] *Barltrop v Bensette*, 2012 ONSC 2196 at paras 22-23.
[33] *SDA, supra* note 5 at s 32(4).
[34] *SDA, supra* note 5 at s 32(5).

- An attorney must know and understand the difference between "mandatory expenditures" and "optional expenditures" (as defined in the *SDA*);[35]
- An attorney must make reasonable efforts to determine: (a) whether the incapable person has a Will; and (b) if the incapable person has a Will, what the provisions of the Will are;[36]
- An attorney must keep all records and information confidential, unless required to disclose in accordance with a court order or under the *SDA* or any other Act, or as is consistent with or related to one's duties as attorney;[37] and,
- An attorney must keep accounts of all transactions involving the property of the incapable person and be prepared to account using the prescribed form.[38]

An attorney is also a fiduciary who is in a special relationship of trust with the grantor. A fiduciary has the power to alter the principal's legal position. As a result of this special relationship, the common law imposes obligations on what an attorney acting as a fiduciary may do. Thus, an attorney also has the following common law duties:

- An attorney must stay within the scope of the authority delegated;
- An attorney must exercise reasonable care and skill in the performance of acts done on behalf of the donor (if acting gratuitously, the attorney may be held to the standard of a typically prudent person managing one's own affairs; if being paid the attorney may be held to the standard applicable to a professional property or money manager);
- An attorney must not make secret profits;
- An attorney must cease to exercise authority if the POA is revoked;
- An attorney must not act contrary to the interests of the grantor or in conflict with those interests;
- An attorney must account for dealings with the financial affairs of the grantor, when lawfully called upon to do so;

[35] *SDA, supra* note 5 at s 37.
[36] *SDA, supra* note 5 at s 33.1. See also *McKenzie v Morgan*, 2023 ONSC 1457.
[37] *SDA, supra* note 5 at s 4.
[38] *SDA, supra* note 5 at s. 32(6).

- An attorney must not exercise the POA for personal benefit unless authorized to do so by the POA, or unless the attorney acts with the full knowledge and consent of the grantor;
- An attorney cannot make, change or revoke a Will on behalf of the donor; and
- An attorney cannot assign or delegate authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

The foregoing common law duties owed by attorneys for property and for personal care are in addition to any specific duties that may have been set out by the grantor in the POA document itself and those set out in the *SDA*.

Notably, in situations where a capable grantor appoints an attorney to deal with property, the attorney is an agent of that person, carrying out the instructions of the grantor (in this case the grantor is considered the principal). Though the fiduciary standard or expectation is lower in such a relationship, an attorney in this position is still a fiduciary with an accountable duty only to the grantor and should, therefore, keep written documentation of instructions and act diligently and in good faith.

The Attorney under a CPOAP has the option at any time to request direction or assistance from the Court on any question concerning the management of property, including perfecting the effectiveness of the POA document if necessary.[39]

An attorney for property who takes compensation for managing the property of an incapable person under a CPOAP will generally too, be held to a higher standard of care. Specifically, an attorney who receives compensation for managing property must exercise the degree of care, diligence, and skill that a person in the business of managing the property of others is required to exercise.[40] In comparison, an attorney who does not receive compensation must only exercise the degree of care, diligence, and skill that a person of ordinary prudence would exercise in the conduct of one's own affairs.[41]

[39] *SDA*, *supra* note 5 at s 39(1).
[40] *SDA, supra* note 5 at s 32(8).
[41] *SDA, supra* note 5 at s 32(7).

If an attorney for property breaches any duties, whether arising in equity, at common law or by statute, the attorney may be liable for monetary damages arising from the breach.[42] Where the court is satisfied that the attorney for property who committed a breach of duty acted honestly, reasonably, and diligently, however, it may relieve the attorney from all or part of the liability.[43] Where an attorney for property is acting as a director of a corporation in which the incapable person is a shareholder and breaches one's duties, the attorney will have to demonstrate to the court they acted honestly, reasonably, and diligently with a view to the best interests of the corporation in order to be relieved from all or part of the liability.[44]

Duties, Standard of Care, and Liability of a Power of Attorney for Personal Care

The Attorney for Personal Care also must exercise powers diligently and in good faith.[45] As with any attorneyship for property, attorneys for personal care are required by law to foster the incapable person's independence, to encourage the incapable person to participate in personal-care decisions to the best of one's ability and to consult with the incapable person's supportive family and friends and with the persons who provide personal care to the incapable person.

The Attorney for Personal Care is required to make decisions on the incapable person's behalf in accordance with the *SDA*, and some guidance can be further obtained from the *Health Care Consent Act, 1996*.[46] Section 66 of the *SDA* sets out the duties of a guardian for personal care, and section 67 extends these duties, with necessary modifications, to attorneys for personal care acting pursuant to a POAPC. Where neither act applies, the attorney acting under a POA must also have regard to the known wishes or instructions of the incapable person, expressed at a time when the person had capacity. Similarly, such an attorney must use reasonable efforts to act in accordance with the wishes or instructions of the incapable person or otherwise act in their best

[42] *SDA*, *supra* note 5 at ss 31(1) and 33(4).
[43] *SDA*, *supra* note 5 at s 33(2).
[44] *SDA, supra* note 5 at s 33(3).
[45] *SDA, supra* note 5 at s 66(1).
[46] Decisions under *Health Care Consent Act, 1996* – s. 66(2.1) – The guardian shall make decisions on the incapable person's behalf to which the *Health Care Consent Act, 1996* applies in accordance with that Act.

interests. To do this, the attorney must consider the values and beliefs of the individual in question, current wishes, if ascertainable, general standard in quality of life, and whether the benefit of the decision outweighs the risk of harm to the person from alternate decisions.[47]

A personal care attorney is required to keep comprehensive records of decisions taken, including a comprehensive list of health care, safety, shelter decisions, medical reports or documents, names of persons consulted, dates, reasons for decisions being taken, and a record of the incapable person's wishes.[48] No proceedings for damages shall be commenced against an Attorney for Personal Care for anything done or admitted in good faith in connection with the Attorney for Personal Care's powers and duties under the *SDA*.[49]

(iv) Newfoundland Regime

In Newfoundland and Labrador, the *Enduring Powers of Attorney Act*[50] *("EPAA")* sets out the requirements and governance of POAS. As in Ontario, there are two main types of POAS: general and "enduring" (instead of "continuing" as in Ontario). Subject to any conditions or restrictions stated in an Enduring Power of Attorney ("EPA"), a document is a valid and effective EPA if it expressly states that it may be exercised during any subsequent legal incapacity of the grantor (or "donor").[51] The EPA must also appoint someone who is at least 19 years old, must be signed by the donor, and witnessed by a person who is not the appointed attorney, or the spouse/partner of the attorney.[52] As in Ontario, an attorney named in an EPA must act in the best interests of the donor and may

[47] *SDA, supra* note 5 at s 66(4).
[48] *SDA*, *supra* note 5 at s 66(4.1).
[49] *SDA, supra* note 5 at s. 32(7).
[50] *Enduring Powers of Attorney Act*, RSNL 1990 C E-11.
[51] *Ibid*. s 5.
[52] *Ibid.,* s. 3.

be liable for any loss resulting from his or her failure to do so.[53] The attorney also has a duty to account when required to do so by court order.[54]

In Ontario, if the named attorney can no longer act or is removed by court order, the only alternative is a court-appointed guardian. However, in Newfoundland, the *EPAA* allows for a court order substituting another person for the attorney named in the EPA.[55]

Unlike statutory laws in Ontario, the *EPAA* also provides provisions for "designation agreements" for people who are specifically incapable of entering into a registered disability savings plan ("RDSP") agreement. These agreements allow for the appointment of an authorized individual to be the holder of the incapable person's RDSP on their behalf only. The agreements to not otherwise affect the grantor's ability to deal with his or her assets or make decisions relating to other matters, including health care.[56] Sections 15-22 of the *EPAA* sets-out the required level of capacity to enter into a designation agreement, requirements for the agreements, how they operate, provisions for revocation, termination, or death or incapacity of the designate, and other related provisions.

Another related statue of note is the *Adult Protection Act, 2021*.[57] This Act aims to provide protection for incapable adults who are incapable of caring for themselves or are abused or neglected. The Act presumes that every adult has the capacity to make decisions unless proven otherwise, and aims to provide mechanisms for protection in line with the following "service principles":[58]

- an adult is entitled to live in the manner they wish to do so, so long as he or she is capable of making decisions respecting lifestyle;
- the paramount consideration shall be the best interest of the adult alleged to need assistance or protection;

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[53] *Ibid.*, s 6.

[54] *Ibid.*, s 10. Any person with an interest in the estate (including the public trustee) or any other person, with permission of the court, may apply.

[55] *Ibid.,* s 9.

[56] *Ibid*., s 15(5).

[57] *Adult Protection Act, 2021*, SNL 2021 C A-4.02.

[58] *Ibid*., s 8.

- the adult in question should be involved in the decision-making to the greatest possible extent;
- any intervention should be the least restrictive and intrusive form of support or protection possible;
- an intervention should be designed for the specific needs of the adult in question, be reviewed regularly and revised as appropriate;
- delivery of services under the act should, where appropriate, preserve the adult's cultural and community connections, and family ties; and,
- if desired, the adult should be encouraged to seek assistance and advice from family and friends in order to understand choices and make and communicate decisions.

IV. Case Law: Misuse and Abuse of POAS

The following cases provide examples of common scenarios where POAS have been misused or abused.

Picone v Mossetti[59]

Picone v Mossetti concerned an attorney being ordered to repay money improperly taken. Picone involved a son who breached his duty as an attorney by compensating himself $8,000 annually for 31 years for caregiving despite a provision in the POA document that said no compensation was payable. While the mother was in a long-term care home, the son withdrew an average of $9,800 a month from a joint account he held with her from August to December 2018. Moreover, the son withdrew an average of

[59] *Picone v Mossetti,* 2023 ONSC 1038.

$48,000 per month from her finances in 2019. Lastly, the son sold his mother's property in his authority as her Attorney for Property for $1 million but withdrew $40,000 from the proceeds and transferred it into his own bank account. The court ordered the attorney to repay his pre-taking of compensation, holding that the mother's estate "must be repaid due to his failure to account, his gross indifference to his fiduciary duties, and his use of his mother's property as his own." Repayment pursuant to the power of attorney breach was in the total amount of $720,000.

***Waters Estate v Gillian Henry et al*[60]**

The background from this recent Ontario case involved the deceased, William, who made substantial gifts from his incapable wife's, Phyillis, property to a woman, Gillian, with whom he had an intimate relationship. William also made gifts from his own property to Gillian, however, William was acting as attorney for property for his wife when he made the gifts from her property to Gillian. The court held that most of the gifts from William to Gillian were valid. The court held that the money gifted from Phyillis' property were not valid gifts, noting that there was no "legitimate donative intent" because William had no right to gift Phyillis' property, William's conduct was determined to be unconscionable and therefore the doctrine of equitable fraud applied.

***Withenshaw v Withenshaw*[61]**

In this case, the deceased's sons sought an accounting from their sister, Gail, following the deceased's death. Gail had acted as attorney for property and due to her failure to provide any supporting documents in her accounting, was ordered to pay over $300,000 back to the estate plus costs. Gail failed in her appeal as the Court held that the necessity and prolixity of the proceedings were attributed to Gail who "resisted any effort to account, delayed matters, and required the respondents to obtain disclosure and production orders..."[62]

[60] *The Estate of William Robert Waters v Gillian Henry et al*, 2024 ONSC 4190.
[61] *Withenshaw v Withenshaw*, 2023 NSCA 59.
[62] *Ibid*. at para 51.

Coish v Walsh[63]

The issue on appeal in this case involved whether the transfer of the deceased's primary residence into joint tenancy with her son should be set aside due to undue influence. The facts involved the deceased, Rowena, who was a patient at a geriatric hospital as a result of a broken hip. Earlier she had given her daughter, the respondent, Valerie, an enduring power of attorney. For reasons what were not clear, Rowena became concerned that her house might be sold by Valerie. Sometime later, Rowena's son, Darrel, with the involvement of his fiancée, arranged with a lawyer to meet with Rowena at the hospital to sign a new power of attorney appointing Darrel and a conveyance of the property from Rowena to Rowena and Darrel as joint tenants. While there was evidence that Rowena understood that the conveyance would help avoid the possibility that the house be sold, she did not understand the changes it would make to her estate plan upon her death, which was that her estate would be divided equally between her two children.

The trial judge held that Rowena was competent to execute the new power of attorney and the conveyance, however, the court set aside the deed of conveyance finding that the presumption of undue influence that arose by reason of the parent-child relationship was not rebutted. Of particular note, the trial judge found that Rowena was never told that the conveyance would substantially change her estate plan and "there was not the degree of independent advice present in this case to displace the presumption of undue influence ...".[64] The appeal judge upheld the trial judge's decision confirming that it is not necessary to establish that Rowena was disadvantaged or victimized in order for the presumption of undue influence to arise.

Nguyen-Crawford v Nguyen[65]

The case of *Nguyen-Crawford v Nguyen* involved a dispute among five siblings over the validity of POA documents executed by their mother, Tuyet Ngoc Nguyen ("Ms. Nguyen"). Ms. Nguyen's youngest daughter, Thuy Nguyen-Crawford ("Thuy") was

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[63] *Coish v Walsh*, 2001 NFCA 41. See also the trial division decision at *Coish v Walsh*, 1999 CanLII 19712 (NL SC).

[64] *Ibid*. at para 24.

[65] *Nguyen-Crawford v Nguyen*, 2010 ONSC 6836.

granted a POAPC and CPOAP by her mother in 1998. Ms. Nguyen suffered a stroke in 2008, triggering Thuy's decision-making power under the 1998 POAS. The other four siblings (the "Older Siblings") obtained new POAS from Ms. Nguyen in 2009.

Thuy and the Older Siblings brought competing applications with respect to the 1998 and 2009 POAS. The Older Siblings eventually conceded that the 2009 POAS were invalid due to Ms. Nguyen's incapacity; however, the older siblings alleged that Thuy exercised undue influence over Ms. Nguyen with respect to executing the 1998 POAS and so they were also invalid. The Older Siblings thus made an application to become Ms. Nguyen's guardians for property and personal care.

The dispute became heated as the Older Siblings alleged that Thuy had depleted Ms. Nguyen's assets through risky iTRADE investments and denied Thuy access to Ms. Nguyen both by phone and in person. Specifically, the Older Siblings alleged that Thuy and her husband, Darren, had forged Ms. Nguyen's signature on documents related to her iTRADE investment account over which Thuy and Darren had power of attorney.

The Court held that the 1998 POAS were invalid due to undue influence by Thuy. This undue influence finding arose from the fact that Ms. Nguyen did not speak English, and she received no translation of the POA documents, nor of the legal advice provided by the drafting solicitor, other than the translation provided by Thuy, on whom the documents bestowed extensive powers.

The Court also held that while there was insufficient evidence to demonstrate that the iTRADE investments that Thuy and her husband made on her mother's behalf amounted to fraud, the investments were certainly beyond the risk tolerance that Ms. Nguyen was known to have had. Again, relying on the fact that Ms. Nguyen did not receive independent translation of documents related to the iTrade account, the Court held that the trades made by Thuy and Darren were either made without Ms. Nguyen's authority or by the exercise of undue influence.

The Court ordered that the Older Siblings be made Ms. Nguyen's guardians for personal care and for property, but did not order Thuy to pass her accounts as Ms. Nguyen's attorney.

***Levesque v Klarenbach*[66]**

The claims raised in this case occurred in the context of power of attorney litigation involving an accounting. The decision serves as an example of the importance of properly advising clients against fishing expeditions, and of parties' rights to request disclosure. The applicant sought very extensive disclosure without citing any statutory authority upon which the Court could grant the order. The Court denied the requested relief noting the lack of authority cited, and that there was no evidence of misappropriation, suggesting it was merely a fishing expedition.

***Drewniak v Smith et al*[67]**

Although the criteria for determining requisite capacity to grant a POA has not recently changed, it continues to be a commonly litigated issue with corresponding developing nuances. In this case, the applicant tried to argue that a competent person should not be able to change a longstanding POA without any additional questions being asked, or a more in-depth analysis being done. The Court did not agree, rather, to hold that a competent grantor can appoint and replace their attorney at any time. So long as the drafting lawyer is satisfied that the donor is competent, there is no need to make further inquiries or to investigate the donor's motives for the change (absent suspicious circumstances).

***Falsetto v Falsetto*[68]**

In *Falsetto v Falsetto*, the Ontario Court of Appeal confirmed that an Attorney for Property did not breach his fiduciary duties when he transferred property of the grantor to himself. Between 2010 and 2016, the grantor instructed his son and Attorney to transfer various amounts of money and title to certain properties to himself. Later, the grantor brought an action against the Attorney for unjust enrichment and breach of his fiduciary duties. Following a review of the evidence, the trial judge concluded that these payments were meant as gifts and the Attorney had rebutted the presumption of resulting trust. The

[66] *Levesque v Klarenbach,* 2024 SKKB 130.
[67] *Drewniak v Smith et al*, 2023 MBKB 109.
[68] *Falsetto v Falsetto*, 2023 ONCA 469.

Court of Appeal upheld the trial judge's decision. The Court of Appeal concluded that the Attorney did not breach their fiduciary obligations since the grantor authorized all the disputed transfers. Thus, when the Attorney transferred assets to himself, he simply fulfilling the grantor's instructions.

***Teffer v Schaefers*[69]**

The case of *Teffer v Schaefers* is one that concerned the use of an invalid power of attorney document. The victim in that case was Mrs. Schaefers, who was 87 years old at the time the case was heard. She had been diagnosed with Alzheimer's disease and relied on the assistance of 24-hour nursing care in her home. She had also been assessed by a professional medical assessor and found to be incapable of managing her property and making decisions regarding her personal care – a fact the Court confirmed. Even though there was considerable evidence which supported the view that Mrs. Schaefers did not have the capacity to assign a POA, Mr. Verbeek, a lawyer, had Mrs. Schaefers execute a POA on April 27, 2006, naming him as her attorney.

While the Court found that there were no capacity issues with respect to the 1998 Power of Attorney for Property, it found that Mrs. Schaefers did not have the capacity to give a Power of Attorney for Property on April 27, 2006, and, therefore, the document was not valid and could not stand. The Court concluded that Mr. Verbeek ought to be removed as attorney.

There was strong and compelling evidence of neglect on the part of Mr. Verbeek such that the wishes of Mrs. Schaefers as set out in the 1998 Power of Attorney for Property should be terminated. The Court found that Mrs. Schaefers' best interests were not being met, and that Mr. Verbeek's conduct clearly demonstrated an inability to understand and perform his duties diligently (such as complying with disclosure requests or proceeding with a passing of accounts), even in the face of two Court Orders requiring him to do so. The Court concluded that an attorney for property is a fiduciary, and the duties and responsibilities of an attorney are significant. Thus, if Mr. Verbeek was too

[69] *Teffer v Schaefers*, 2008 CarswellOnt 5447, 93 O.R. (3d) 447 (Ont. S.C.J. Sep 12, 2008); Additional reasons in: *Teffer v Schaefers*, 2009 CarswellOnt 2283 (Ont. S.C.J. Apr 06, 2009).

busy as a sole practitioner to discharge his duties as an attorney for the property of Mrs. Schaefers, then he should be relieved of those responsibilities.

***Zimmerman v McMichael Estate*[70]**

*Zimmerman v McMichael Estat*e is an unfortunate example of an unscrupulous attorney taking large sums of money for his personal benefit under the powers conferred by a POA. The proceedings commenced as an Application by Adam Geoffrey Zimmerman ("Mr. Zimmerman") to pass his accounts with respect to his work as attorney for property of Signe K. McMichael (the "Deceased") and as the trustee of the Signe McMichael Trust (the "Trust").

Mr. Zimmerman met the Deceased and her husband (together, the "McMichaels") in the 1980s. The McMichaels were wealthy art collectors, who donated a large collection of Canadian national treasures to the Province of Ontario in 1966. Immediately following her husband's death in 2003, the Deceased executed a POA appointing Mr. Zimmerman as her attorney for property. This property was worth roughly $5,000,000 at the time. In May 2004, the Deceased established the Trust and directed that all her assets, save $250,000 set aside for bequests, be transferred to the Trust, with Mr. Zimmerman as the sole trustee. In essence, Mr. Zimmerman had complete control over the Deceased's property, which he exercised until his removal as trustee in 2009.

The Deceased's closest relatives, the Fenwick's, brought an Application against Mr. Zimmerman in 2008 to declare the POA and Trust void, and to have Mr. Zimmerman pass his accounts. In several instances, Mr. Zimmerman failed to appear in Court, failed to file necessary documents or failed to comply with Court Orders. The Court found that Mr. Zimmerman's accounts were incomplete, inadequate, and at times, simply false.

The Objection to Accounts filed by the Fenwick's contains 28 pages of unexplained charges by Mr. Zimmerman to the Trust. He charged personal expenses, meals, hotels, and airfare to the Trust, in addition to his compensation, and made several large cash withdrawals. All told, during his management of the Trust, Mr. Zimmerman paid himself

[70] *Zimmerman v McMichael Estate*, 2010 ONSC 2947, 2010 CarswellOnt 3481.

$365,462.50 CAD and $85,400.00 USD. He also mingled Trust assets with his own property and engaged in several other conflicts of interest and breaches of duty.

Though there is much in Mr. Zimmerman's actions to discredit him, it should be noted that he at all times provided appropriate care for the deceased in his capacity as her attorney for personal care. Mr. Zimmerman was ordered to repay the amounts he took out of the Trust, as well as more than $300,000 in additional legal costs. Mr. Zimmerman died suddenly in early 2011, leaving his estate to contend with the debts he owed to the Deceased and her estate.

***Carey v Carey*[71]**

This case remains a good reference of the application of the criteria for removing an attorney. Absent compelling evidence, a Court is generally reluctant to interfere with the wishes of the incapable person while fully capable as expressed in his/her choice of attorney. In this case, the attorney failed to explain how $42,000 was spent, had failed to obey previous court orders, may have pawned the grantor's jewelry, showed little skill in using her funds in a responsible manner, and failed to foster regular contact with other family members. In these circumstances, the applicant was successful in the application to have the attorney removed.

***Sevello v Sevello*[72]**

While not specifically a POA case, in this decision, a son took his recently widowed mother to what he told her was a "courthouse" and had her sign a "document which would give him the power to look after her as she grew older."[73] In reality, he took her to the registry office and with the assistance of a conveyancer transferred the title of his mother's residential property into his name as sole owner. A few weeks later he returned and transferred the property to himself and his mother as joint tenants.

When the mother discovered the title transfer, she commenced an action against her son and requested an order from the court transferring the property back to her as sole

[71] *Carey v Carey,* 2018 ONSC 4564.
[72] *Sevello v Sevello,* 2014 ONSC 5035.
[73] *Ibid* at para 6.

owner. The son counterclaimed seeking a legal or equitable interest in the property, based on improvements he had made to the house. The Court set aside the son's transfer of the house and dismissed the son's claim for a legal or equitable interest in the house as, among other reasons, he did not come to court with "clean hands".[74]

***Mroz v Mroz*[75]**

In this Ontario Court of Appeal decision, an adult daughter convinced her widowed mother to transfer the title of the mother's house (her only significant asset) into joint ownership with her daughter. On the mother's death, the daughter claimed that she was the sole owner of the house. However, the mother's Will said that two of her grandchildren were to receive portions of the proceeds of the sale of her house upon her death. The daughter ignored the Will, sold the mother's house (without notifying her family until the day the sale closed), and kept the proceeds for herself. She argued that the money was hers, as she was the sole owner, and she had no obligation to give any money to the grandchildren. The Court found otherwise. While the evidence showed that the mother wanted the daughter to be "looked after" and to receive some of the proceeds from the sale of the house, the Will clearly stipulated that the grandchildren were to receive a portion of the proceeds as well, and there was no evidence that the mother intended to make a gift of the house to the daughter. The Court found that the mother had not "gifted" the house to the daughter but that the daughter was merely holding the house in trust for her estate.

V. Remedies

When abuse of older adults is suspected (especially financial abuse), remedies to correct the wrong or punish the perpetrator can be sought both under provincial laws (e.g., legislation governing property, guardianship, capacity, health, and social services), and/or under federal laws (e.g., the *Criminal Code*).

The following two sections discuss some of the more common legal remedies that are available through civil and criminal proceedings, to address instances of elder abuse

[74] *Ibid.* at para 106.
[75] *Mroz v Mroz,* 2015 ONCA 171.

and to deliver justice to victims. Based on the facts of any given case, there may be circumstances where bringing criminal proceedings is more appropriate than filing a civil lawsuit and vice versa such as cost, remedies sought (i.e., restitution and/or declarations versus punishment), and evidentiary considerations and applicable standards of proof.

(v) Civil Remedies[76]

The following is a summary of some of the civil remedies that a Court can order to address instances of financial elder abuse:Re

- removal of an attorney under a CPOAP;[77]
- order to "account" (i.e., produce evidence of how the money was spent either informally or by court application);[78]
- order to repay money improperly taken;[79]
- A declaration of a breach of fiduciary duty, with resulting remedies such as damages, constructive trust, or disgorgement;[80]
- "setting aside" a transfer of title or bank account into another's name, or joint names;[81]
- injunctive relief;
- setting aside property transfers due to undue influence or incapacity;[82]
- restitution through unjust enrichment/constructive trust or resulting trust;[83]

[76] See also Appendix B "*Elder Abuse Checklist: Civil and Criminal Remedies"*

[77] See *Rudin-Brown et al v Brown,* 2021 ONSC 3366; *Hammond Estate, Re*, 1999 CanLII 19754 (NL SC); *Carey v Carey*, 2018 ONSC 4564; *Teffer v Schaefers*, 2008 CarswellOnt 5447, 93 O.R. (3d) 447 (Ont. S.C.J. Sep 12, 2008); Additional reasons in *Teffer v Schaefers,* 2009 CarswellOnt 2283 (Ont. S.C.J. Apr 06, 2009).

[78] See *Zimmerman v McMichael Estate*, 2010 ONSC 2947 and *McMaster v McMaster*, 2013 ONSC 1115.

[79] *See Calvert v Menzies,* 2024 BCSC 1302; *Picone v Mossetti,* 2023 ONSC 1038; and *Sarzynick v Skwarchuk*, 2021 BCSC 443.

[80] See *Picone v Mossetti*, 2023 ONSC 1038.

[81] See *Thorne v Thorne*, 2018 NLSC 220 (appeal dismissed - see *Thorne v Thorne*, 2019 NLCA 26); *Galloway v Barski*, 2016 BCSC 1588.

[82] See *Coish v Walsh*, 2001 NFCA 41; *Stacey and Chafe v Stacey*, 2009 NLTD 139; *Mroz v Mroz,* 2015 ONCA 171; *Servello v Servello,* 2024 ONSC 5035.

[83] *Sull v Pengelly,* 2019 BCSC 1565, *Sarzynick v Skwarchuk*, 2021 BCSC 443.

- setting aside or declaring a predatory marriage as “void”;[84] and,
- setting aside a transfer using the doctrine of unconscionable procurement.[85]

(vi) Criminal Remedies

While there is not one specific offence of "elder abuse" or "elder financial abuse" created by the *Criminal Code of Canada*[86] *(*the *“Criminal Code”)*, there are various sections that an abuser could be charged under for elder financial abuse, including the following:

- theft by a Person Holding a Power of Attorney (s. 331);[87]
- theft by a person required to account (s. 329)
- theft (s. 322);[88]
- theft over $5,000 (s. 344);
- theft or forgery of a credit card (s. 342);
- robbery (s. 343);[89]
- criminal breach of trust (conversion by trustee) (s. 336);
- forgery (s. 366);
- extortion (s.346);
- fraud (ss. 386-388);[90]
- unlawful confinement (s. 279);
- intimidation (s. 423);

[84] See *Tanti v Tanti et al*, 2020 ONSC 8063 and *Tanti v Tanti*, 2021 ONCA 717; *Feng v Sung Estate*, 2003 CanLII 2420 (ONSC); *Hunt v Worrod* 2017 ONSC 7397.

[85] See *Gefen Estate v Gefen*, 2022 ONCA 1743 and *Kinsella v Pask,* 1913 CarswellOnt 781, 12 DLR 522, 28 OLR 393 (Ont. C.A.). See also *Sandwell v Sayers*, 2023 BCCA 147,

[86] *Criminal Code*, RSC, 1985, c. C-46 (“*Criminal Code*”).

[87] For example, see *R v Hooyer*, 2016 ONCA 44 and *R. v Kaziuk*, 2011 ONCJ 851.

[88] See *R v Webb,* 2011 SKPC 181.

[89] See *R v Wentworth*, 2023 ONSC 5319.

[90] See *R v Taylor*, 2012 ONCA 809; *R v Cousineau*, 2013 BCCA 289; and, *R v Owen*, 2014 ONSC 748.

- neglect: failure to provide the necessaries of life (s. 215) and criminal negligence (s. 219);[91]
- causing death by criminal negligence (where neglect leads to death of older adult) (s. 220);
- uttering threats (s. 264.1);
- physical assault (ss. 265, 266); and,
- sexual assault (s. 271).

Notably, Section 718 of the *Criminal Code* ("Purpose and Principles of Sentencing"), which was introduced in 2013, provides criminal courts with additional factors that are to be considered when determining the appropriate sentencing in criminal proceedings. Of relevance to instances of elder abuse, Section 718 notes that criminal sentences should be increased in circumstances where there is evidence that:

- the offence was motivated by age, or mental or physical disability (s. 718.2(a)(i));
- the offender abused a position of trust or authority in relation to the victim (s. 718.2(a)(iii); or
- the offence had a significant impact on the victim, considering the victim's age and other personal circumstances, including their health and financial situation (s. 718.2(a)(iii.1)).

The option of pursuing POA misuse and abuse through criminal remedies should not be overlooked. In many of the cases noted above, it was a neighbor who reported the abuse and/or neglect to the police. This again speaks to the difficulty of identifying financial elder abuse, as it often occurs within intimate familiar relationships. Anyone witnessing elder abuse, not just family members, can contact the police. In elder financial abuse situations, one does not have to pursue one or the other, civil or criminal litigation. If both avenues are pursued, a criminal conviction will go a long way in proving the civil case for the plaintiff. This will, however, depend on whether the criminal case is tried first.

[91] See *R v Brush*, 2022 BCSC 1194 (CanLII); *R v Davy,* 2015 CanLII 10885 (ON SC); *R v Kos-Rabcewics-Zubkowski,* 2010 ONCJ 780; *R v Nanfo*, 2008 ONCJ 313; *R v Peterson*, 2005 CanLII37972 (ONCA); and *R v Chartrand*, 2009 CanLII 20709 (ONSC).

There are also other considerations such as whether the civil proceeding would be stayed.

VI. Concluding Comments

Powers of Attorney are essential legal documents that provide a regime for substitute decision-making when needed. However, when misused or exploited, the result can be a serious form of elder abuse that can have devastating consequences for vulnerable individuals, undermining their autonomy and security. And, sadly, it is all too prevalent today with the familiar relationships in these cases often making them difficult to address effectively. Legal remedies such as the revocation of the POA, guardianship, and the pursuit of civil remedies for financial redress provide avenues for justice and holding perpetrators accountable. In cases where abuse is suspected, the courts can intervene to protect the interests of the elderly, ensuring that their rights and assets are preserved.

It is vital for families, advisors, and the community-at-large, to remain vigilant, ensuring that those who are entrusted with powers of attorney act in the best interests of the elderly, with transparency and accountability. Advisors must be aware of the far-reaching consequences of this area, the potential minefield of things that can go wrong, as well as ensuring familiarity with the legislation and case law to competently advise clients. These concerns apply to lawyers, whether solicitors addressing a client's concerns at first instance, or barristers litigating after the fact. Advisors must also be vigilant about the fraudulent possibilities that attach to powers of attorney. One should ensure that clients are clear on all the duties and responsibilities that attach to the granting of a power of attorney.

Ultimately, the goal should be to balance autonomy with protection, preserving the dignity and well-being of older adults while preventing the misuse of their legal rights and providing robust legal avenues for victims of financial abuse to seek justice.

APPENDIX A: ELDER ABUSE CHECKLIST

As our Canadian population ages, elder abuse is an increasingly prevalent issue in our society. Elder abuse can take on many forms including financial, physical, psychological (mental or emotion), sexual, and neglect. It is often perpetuated at the hands of a trusted family member, caretaker, or familiar person whom the older adult relies on and/or who can easily exert control or influence over the victim.

Financial Abuse

One of the more common types of elder abuse, financial abuse, is often perpetuated using a Power of Attorney document. Some instances of financial abuse include:

- ❑ Misusing or abusing a Power of Attorney document;
- ❑ Stealing an older adult's money, pension cheques, or possessions;
- ❑ Committing fraud, forgery or extortion;
- ❑ Sharing an older adult's home without paying a fair share of the expenses; and
- ❑ Unduly pressuring a senior to:
    - Sell personal property
    - Invest or take out money
    - Buy alcohol or drugs
    - Make or change a will
    - Sign legal documents they do not understand including documents that transfer assets into joint names
    - Give money to relatives, caregivers or friends, or
    - Engage in paid work to bring in extra money.

Indicators of Financial Abuse

There are several “red flags” to look for which may indicate the perpetration of elder financial abuse, including:

- ❑ Changes in living arrangements, such as previously uninvolved relatives or new friends moving in, with or without the older adult’s permission;
- ❑ Unexplained or sudden inability to pay bills;
- ❑ Unexplained or sudden withdrawal of money from accounts;
- ❑ Poor living conditions in comparison with the older adult’s assets;
- ❑ Changes in banking patterns due to pressure;
- ❑ Changes in the older adult’s appearance;
- ❑ Controlling an older adult’s spending;
- ❑ Confusion or lack of knowledge about financial situations and signing of legal documents;
- ❑ Being forced to sign multiple documents at once;
- ❑ Being coerced into a situation where a an older adult is being overworked and underpaid;
- ❑ Unexplained disappearance of possessions (lost jewellery or silverware);
- ❑ Changes in an older adult’s power of attorney;
- ❑ Necessities of life denied or not provided by an older adult’s attorney under a power of attorney document (shelter, food, medication, assistive devices);
- ❑ Being overcharged for services or products by sales people or providers; or

- Denying an older adult his/her right to make independent financial decisions.

Underreporting of Financial Elder Abuse

Financial elder abuse is often under-reported (either to the police or to other support person) for several reasons, including that:

- The older adult feels shame or embarrassment that they have been victimized;
- They are fearful of the perpetrator or have a fear of the police or other authorities;
- They are dependent upon the perpetrator for their physical well-being;
- They want to protect the abuser, especially if they are a family member;
- The older adult may feel that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is their only family member or friend;
- They feel guilty for becoming a victim or they blame themselves;
- They may minimize or rationalize away the abuse or they may deny the abuse;
- They may not recognize it as abuse altogether; or
- They may not report it even they have the desire to given limited physical or mental capabilities, including if suffering from dementia.

Questions to Ask and Steps to Take When Investigating Financial Abuse

- ❑ Is there evidence of money or property missing or unaccounted for? Does the alleged offender hold a power of attorney for property?
- ❑ If the victim is capable, visit the victim and obtain financial particulars (the name of the attorney, name of their bank, contact information at the bank branch, account numbers, Old Age Security and Canada Pension Plan information etc.). Once authorized by the victim, look for alternative sources of information (e.g. family members, friends, lawyer who represented the victim when POA was signed).
- ❑ Obtain from the victim a completed consent form for the release of their financial records / bank information. Also obtain a copy of the POA for Property.
- ❑ Contact the financial institutions immediately. Speak to a senior employee of the financial institution (a branch manager, customer service manager etc.) and advise them that you are conducting an investigation into the accounts of the victim. Confirm with them that the information that the victim gave you is accurate.
- ❑ Take the victim's consent form to their financial institution(s), government offices (OAS, CPP) and ask to be provided with the pertinent financial records/evidence.
- ❑ Let the victim know they have a right to revoke the POA (if capable to do so[92]). Suggest that the victim get legal advice about how to do so as soon as possible.
- ❑ Take a formal statement form the victim. Obtain a video statement, audio statement or written statement (be mobile – take a camera to the victim when resources allow. In some cases, a dying declaration may be required. Consult your local Crown Attorney for guidance).
- ❑ Continue to investigate as required. Identify other means of obtaining evidence (e.g. production order, search warrant, other judicial orders of suspect's account(s), records from retirement home or long-term care facility, etc.)
- ❑ If there is adequate evidence, recommend or lay the appropriate charge.
- ❑ Conduct your investigation and document evidence in a way that enables the Crown to recommend an increased penalty under appropriate sentencing provisions due to age related vulnerability of the victim.

[92] See Capacity Checklist http://www.welpartners.com/resources/WEL_SummaryofCapacityCriteria.pdf

❑ If a criminal charge is recommended or laid, consider having the accused resign as the attorney. Their resignation could also be a condition of release.[93]

If the victim has been found mentally incapable of making property decisions or incapable of giving consent to release financial documents:

❑ Consider enlisting the aid of other agencies (ex. Public Guardian and Trustee) to provide support to the victim.

❑ Contact the financial institution immediately and request disclosure of required financial information as per the relevant privacy legislation and the decision of *R v. Lillico*.[94] Financial institution staff can release general information without a warrant under certain circumstances. Request that the financial institution exercise 'due diligence' in relation to the victim's accounts from this point forward.

❑ Still take a formal statement from the victim.

❑ Obtain consent from any person named as attorney in order to retrieve financial records. If consent is not attainable, consider other means to obtain this information (production order, search warrant, other judicial orders). Attend financial institutions to gather pertinent financial records / evidence[95]

This paper and checklist are intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper and checklist are not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, Whaley Estate Litigation Partners *February 2025*

[93] Excerpted from http://www.nicenet.ca/tools-theft-by-persons-holding-power-of-attorney-officersinvestigation-guide

3 [94] 1994 CanLII 7548 (ON SC), upheld on appeal 1999 CanLII 2836 (ON CA)

3 [95] Excerpted from http://www.nicenet.ca/tools-theft-by-persons-holding-power-of-attorney-officersinvestigation-guide.