

Elder Law & The Power of Attorney: Misuse, Abuse, and Fraud

CBA – Newfoundland & Labrador

Elder Law Issues: An Introduction to Key Issues and Insights
for your Practice, February 10, 2025

Kimberly A. Whaley



THE CANADIAN
BAR ASSOCIATION



INTRODUCTION

Power of Attorney Disputes: Overview

- Accounting discrepancies
- Misappropriation of the grantor's assets
- Invalidity of the POA document
- Attorney's dealings with jointly held accounts
- Transfers of real property into joint names with the attorney
- Disputes among jointly appointed attorneys



Types of Powers of Attorney

- Agency relationship between grantor/donor and the attorney
- Two types for property: General and Enduring
- NL legislation also provides for "designation agreements" for RDSPs
- Basic formal requirements for validity
- Often standard form, but can be tailored to specific needs



Duties of an attorney under POA

- Statutory and common law/fiduciary duty to act in the best interests of the donor
- Duty to account
- Stay within scope of delegated authority
- Must not benefit/make profit
- Cannot delegate authority
- Exercise reasonable care and skill



CASE STUDIES

The Estate of William Robert Waters v Gillian Henry et al, 2024 ONSC 4190

- \$30 million gifted to wife's support worker over a 10-year period as well as \$2.85 million from his wife's accounts
- Much consideration given to who William was as a person, his values, habits, etc.
- Cannot gift what is not yours – money gifted to Gillian from Phyliss' property ordered to be returned because of (1) lack of donative intent; (2) doctrine of equitable fraud; and (3) unjust enrichment

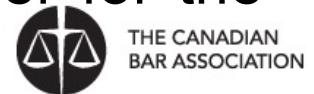


THE CANADIAN
BAR ASSOCIATION



Coish v Walsh, 2001 NFCA 41

- Presumption of undue influence was not rebutted, and a conveyance of a property from an older women, Rowena, into joint names with her son was set-aside
- Trial Judge found that Rowena was capable to make the transfer, she was not made aware of the changes the transfer would make to her estate plan upon her death
- Trial Judge found that the degree of independent advice needed to rebut the presumption was not present in this case
- Appeal court further noted that was not necessary to establish that Rowena was disadvantaged or victimized in order for the presumption of undue influence to arise



Calvert v Menzies, 2024 BCSC 1302

- Failure of pleadings: claims were not plead with sufficient precision and/or the relevant statutory provisions were not included
- Bank statements are not enough, an explanation must be provided
- POA was found liable for failure to account and for undue influence in respect of a \$290,000 deposit/alleged "gift"



Calvert

- Any uncertainties in the accounting are to the attorney's detriment.
- Damages of over \$400,000 awarded based on the Court's discretion to "fashion a common-sense solution despite poor accounting"
- Claim for punitive damages was not awarded. Judge found that the proceeding was "a chapter in a much longer story of intra-family conflict" and did not amount to "oppressive, malicious" conduct



Misuse/abuse of POAS

- *Derreth (Re)*, (2024 BCSC 1033)
 - Attorney cannot make gifts unless the POA expressly permits it
 - No costs to Applicant as application not for benefit of incapable person
- *Dunn v Baird Estate*, (2022 BCSC 498) and 2023 BCCA 216
 - Conjecture based on changes in lifestyle of the attorney are not enough
 - Upheld on appeal (in part)



Costs

- *Withenshaw v Withenshaw*, 2023 NSCA 59
- *Adam v Adam*, 2023 ONSC 3093

"...courts must scrutinize rigorously claims of costs made against the estate of the incapable person to ensure that they are justified by reference to the best interests of the incapable person."

Justice D.M. Brown in *Fiacco v Lombardi*, 2009 CanLII 46170 (ON SC) at para 57.

Withenshaw v Withenshaw, 2023 NSCA 59

- Hearing Judge described attorney's “accounting” as “...scant, and completely lacking in any supporting documents such as invoices or bank account statements.” (2022 NSSC 21 at para 15)
- Attorney was ordered to pay over \$300,000 (including interest) back to the Estate plus costs of approx. \$30,000.00
- The necessity and prolixity of the proceedings were attributed to the attorney who “resisted any effort to account, delayed matters, required the respondents to obtain disclosure and production orders...”



Adam v Adam, 2023 ONSC 3093

- Costs fixed based on "overriding principles of reasonableness, fairness, and proportionality" (para 66)
- Successful Applicant did not seek costs against the incapable person, although Judge noted that he would have awarded full indemnity costs claim above those (fixed) costs awarded against the Respondent, as the full costs were incurred for the incapable person's benefit



Commonly Sought Civil Remedies

- Removal of an attorney (high standard)
- Order to account
- Order to repay money improperly taken
- Setting aside a transfer of title or bank account into another's name or joint names
- A declaration of a breach of fiduciary duty, with resulting remedies such as damages, constructive trust, or disgorgement



Criminal Remedies

- Criminal and/or civil remedies can be sought
- Considerations may include:
 - Costs
 - Remedies sought (i.e., restitution and/or declarations vs punishment)
 - Evidentiary considerations and applicable standards of proof
 - Timing and related considerations (i.e., criminal conviction will assist in proving civil case/civil proceeding many be stayed)



Resources

<https://welpartners.com/resources/>

BOOKS

- Whaley Estate Litigation Partners on Powers of Attorney
<https://welpartners.com/resources/WEL-on-powers-of-attorney.pdf>
- Whaley Estate Litigation Partners on Elder Law
<https://welpartners.com/resources/WEL-on-elder-law.pdf>
- Whaley Estate Litigation Partners on Fiduciary Accounting
<https://welpartners.com/resources/WEL-on-fiduciary-accounting.pdf>

CHARTS / CHECKLISTS

- Cross-Provincial Capacity Legislation Chart
<https://welpartners.com/resources/WEL-2022-Cross-Provincial-capacity-legislation-chart.pdf>
- Civil and Criminal Remedies Elder Financial Abuse Checklist
https://welpartners.com/resources/WEL_Checklist-Civil-vs-Criminal-Remedies-Elder-Financial-Abuse.pdf
- Duties of an Attorney Under Power of Attorney for Property Checklist
https://welpartners.com/resources/WEL_CapacityChecklist_POA_Property.pdf



QUESTIONS & THANK YOU

THANK YOU!



THE CANADIAN
BAR ASSOCIATION

