

Transfers for No Consideration

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Bryan Gilmartin



Attorney for Property Misuse Scenario

- Irma is an older adult who was found incapable of managing her property. Her attorney for property is her son, Erwin.
- Erwin used \$82,000 of Irma's money to purchase a house in his name.
- Erwin's siblings have expressed concern that their brother is using Irma's savings for his benefit. Erwin insists he bought the house for Irma to live in.
- Erwin's characterization of the \$82,000 was inconsistent, at various points calling it an "investment", a "loan", and a property held "in trust". There were no loan documents or trust deeds associated with the property.

Did Erwin misuse his power as Irma's attorney for property?

Attorney for Property Misuse Scenario

Did Erwin misuse his power as Irma's attorney for property?

YES – *In The Estate Of Irmgard Burgstaler (disability)*, 2018 ONSC 1187

- Erwin breached his fiduciary duty to act in Irma's best interest when he took the \$82,000 from her bank account, and bought a property registered in his name alone
- *"As a fiduciary, Erwin was obligated to act only for Irmgard's benefit, putting his own interests aside ... Erwin is not permitted to put himself in a position where his interests and his duty to Irmgard conflict"*

Power of Attorney for Property

- Individuals have freedom to sell, transfer, or mortgage their property
- What happens if an individual loses capacity?



Continuing Power of Attorney for Property

SOME TERMS:

- **CPOAP:**

A document that details the scope and powers a Grantor grants their Attorney

- **Grantor:**

The person who *grants* certain decision making powers to another under a formal document.

- **Attorney:**

The person to whom the Grantor grants decision making powers.

KEEP IN MIND...

- Power of Attorney Documents are governed by the *Substitute Decisions Act and common law fiduciary duty*
- A CPOAP is effective *from date it is executed* until it is revoked
- A CPOAP relates only to the Grantor *during their lifetime*, upon the Grantor's death the CPOAP is inoperative

Ascertaining validity of a CPOAP

CONTINUING POWER OF ATTORNEY FOR PROPERTY
THIS CONTINUING POWER OF ATTORNEY FOR PROPERTY is given
by **JOHN DOE**, of Toronto, Ontario

APPOINTMENT

1. I APPOINT my wife, **JANE DOE**, of Toronto, Ontario to be my attorney for property, pursuant to the *Substitute Decisions Act, 1992*, as amended from time to time, and I authorize my attorney to do, on my behalf, any and all acts which I could do if capable, except make a will, subject to any conditions and restrictions contained herein.

CONTINUING POWER

2. It is my intention and I so authorize my attorney that this authority shall be exercised during any incapacity on my part to manage my property, pursuant to sections 7 and 14 of the *Substitute Decisions Act, 1992*, as amended from time to time.

EFFECTIVE DATE

3. This continuing power of attorney for property comes into effect as of the date of execution set out below.

REVOCATION

4. Any prior power of attorney for property or any prior power of attorney which affects my property given by me is hereby revoked.

Executed at Toronto, Ontario this ## day of MONTH, 2022, in the presence of both witnesses, each present at the same time.

Witness

Witness

JOHN DOE

When making a CPOAP, a Grantor....

■ MUST...

- ☐ be at least 18 years old
- ☐ be capable of granting a CPOAP
- ☐ properly execute the CPOAP with the requisite two witnesses and their signatures and clarity as to the document being “continuing”

■ NEED NOT...

- ☐ adhere to any particular form
- ☐ be capable of managing his or her property

Continued....

Ascertaining validity of a CPOAP

Proper execution of a CPOAP

Generally: the CPOAP document must...

State that it is a Continuing
Power of Attorney

OR

Express the intention that the
authority given may be
exercised during the Grantor's
incapacity to manage property

+

Be witnessed

AND

Signed by those two witnesses

Continued....

Capacity in General

- There is no single legal definition for “capacity”
- No single “test” for capacity, not really a test

Capacity is

- **DECISION** specific;
- **TIME** specific;
- **SITUATION** specific;
- Capacity may **FLUCTUATE**



Inter Vivos Gift

- During one's lifetime, different sizes, small portion of assets or entire life savings (different than testamentary = always all assets)
- *Ball v Mannin*: understand the nature and effect of the transaction, if given full explanation of basic terms

Inter Vivos Gifts: Size

- Size of gift matters:
gift that is **significant in value** in relation to donor's estate = **testamentary capacity**
- *Petrowski v Petrowski* 2009 ABQB 196 – all gifts?

Authorizing a Transfer under a POA

- Participation of lawyers in a transfer of property is mandatory
- Statement by Attorney for Property required
- Statement by solicitor confirming they have reviewed the POA with the Attorney

Responsibilities of Solicitors for Sellers and Buyers

SELLERS

- Obtain original or authenticated copy of POA
- Be informed as to details of its use,
- Understand what becomes of funds

BUYERS

- Review the agreement of purchase and sale for indication transaction being completed using POA
- Obtain authenticated copy of POA; ensure POA executed in accordance with statutory requirements

Financial exploitation through use of a CPOAP

An Attorney for Property misuses / abuses a grantor's property when....

- steals the grantor's money, pension cheques, or possessions
- commits fraud, forgery or extortion
- makes unauthorized, questionable or even speculative investment decisions, or investment decisions lacking diversity
- fails to consider the tax effects of actions or inactions
- inappropriately deals with jointly held assets or accounts
- misappropriates the grantor's assets
- shares the grantor's home without paying a fair share of the expenses
- withholds from the grantor bank statements/other financial documents
- denies the grantor access and/or control over finances (e.g., credit cards, cheques)

Financial exploitation through use of a CPOAP

“MISSAPPROPRIATE” VS “STEALING”

To “**misappropriate**” means to dishonestly or unfairly take something, especially money, belonging to another for one's own use

vs.

To “**steal**” means to take another person's property without permission or legal right and without intending to return it



Financial exploitation through use of a CPOAP

An Attorney for Property misuses / abuses a grantor's property when....

- unduly pressures the grantor to:
 - sell personal property
 - move from/sell grantor's home
 - Invest/withdraw money
 - buy alcohol/drugs
 - Make/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; and/or
 - engage in paid work to bring in extra money

Undue Influence

The doctrine of undue influence can be used to set aside certain transactions like *inter vivos* gifts, wealth transfers, and testamentary documents where through the exertion of influence of the mind of the donor, the mind falls short of being wholly independent



Unconscionable Procurement

- The doctrine of unconscionable procurement is used to set aside significant gifts and other *inter vivos* wealth transfers where the maker did not fully appreciate the effect, nature, and consequence of those transactions.

Red Flags & Best Practices:

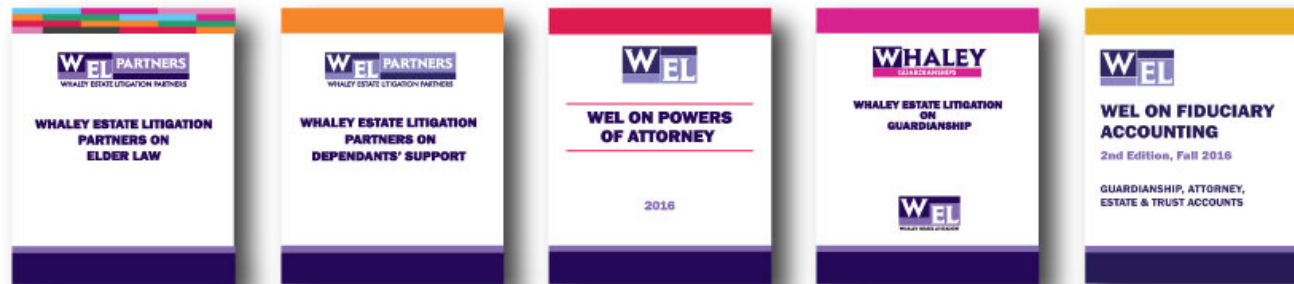
- Intellectual impairment, memory problems, disorientation, poor attention
- Unaware of risks to self and others
- Irrational behavior, reality distortion: delusions
- Unresponsive and inability to make a decision
- Cannot easily identify assets or family members
- Made any recent gifts? Significant?
- Medical events or health changes?
- Client's opinions tend to vary?
- Any medical opinions?
- Physical impairment?
- Communication issues – language barriers?



Steps to Avoid Undue Influence

- Clear indication in notes re capacity
- Detailed & thorough notes
- Interview client alone / probing questions
- Make checklists
- Trust your instincts: consider declining retainer
- Mindful of *Code of Conduct*

WEL Partners Resources



Fiduciary Accounting: <http://welpartners.com/resources/WEL-on-fiduciary-accounting.pdf>

Guardianship: <http://welpartners.com/resources/WEL-on-guardianship.pdf>

Powers of Attorney: <http://welpartners.com/resources/WEL-on-powers-of-attorney.pdf>

Dependants' Support: <http://welpartners.com/resources/WEL-on-dependants-support.pdf>

Elder Law: <http://welpartners.com/resources/WEL-on-elder-law.pdf>

Questions & Contact Information

45 St. Clair Ave. West, Suite 600
Toronto, Ontario, M4V 1K9

Main Telephone: (416) 925-7400
Facsimile: (416) 925-7464

<https://welpartners.com>

