

Update on Litigation Relating to Enduring Powers of Attorney and Personal Directives

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Drafting Personal Directives and Enduring Powers of Attorney

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1. INTRODUCTION

The focus of this LESA seminar is on the drafting of Enduring Powers of Attorney (EPA's) and Personal Directives (PD's). We all know that as a society we have an aging population, and that life expectancy is increasing. A greater and greater number of individuals are taking steps to ensure that their wishes are respected in the event of incapacity. This is wise and sensible, but it is also entirely predictable that there will be an increasing number of disputes within families as to the arrangements made, and more frequent challenges to the actions taken by the persons who have been given responsibilities.

Our knowledge needs to include a familiarity with the legislation and the common precedents for EPA's and PD's, but it is equally important for us to be familiar with what some of the common problems are which are encountered when the documents are implemented, so that we can advise the clients on how to avoid those problems. Knowing potential pitfalls can be very useful.

Unfortunately, many clients see these documents as routine or cookie cutter, and think that any standard form will do. There are any number of EPA's and PD's available to our clients from free web sites, financial advisors, and funeral homes, or through kits at a minimal cost. Unfortunately, those "fill in the blank" forms may create as many problems as they attempt to resolve, so we need to be able to explain to clients why these documents deserve time and attention.

It is also important to note at the outset that this an area where the law is evolving rapidly, and where there are challenging intersections between medical decisions and legal decisions. As Prof. Oosterhoff has noted:

The law of substitute decisions is very much a work in progress. The provincial substitute decision-making laws are not perfect. Conflicting opinions abound as a result of untried legislation and continual evolution of complex family and care arrangements. However, despite the idiosyncrasies and blips, the legislation is effective in providing individuals with the opportunity to choose how their affairs shall be

governed if they should become incapable.¹

The legislation is only one part of the puzzle, in that the attorney is also bound by the common law.

As was noted by Graesser J.:

A power of attorney is a unique power that embodies the law of agency, borrows from the law of contract, and adopts the law of fiduciary obligations.²

With that in mind, this paper will look at:

- the most common issues with EPA's and PD's as seen in the cases,
- the steps involved in implementing an EPA or a PD, and
- some suggestions for topics that you might want to discuss with your clients in planning and implementing an EPA or PD.

a. The Most Common Issues

From a review of the reported Alberta cases on *ecarswell* and *Quicklaw*, it is readily apparent that there are two frequent issues which appear again and again in EPA litigation. They are:

- whether the donor had the capacity to sign the documents, and
- the accounting prepared by the attorney, or more accurately, an allegation that the attorney has failed to account.

These are by no means the only issues, but they are remarkably frequent.

Personal Directives do not seem to generate nearly as many cases as EPA's, but a review indicates that capacity is again a regular issue, and interestingly, the right or authority to make end of life decisions is appearing more and more frequently.

It is also apparent from a review of the cases that many of the family members involved in these

¹Oosterhoof, *Oosterhoof on Wills and Succession* (Carswell 2001)

²*MacDonald v. Taubner* 2010 ABQB 60, 55 E.T.R. (3d) 65, 21 Alta. L.R. (5th) 59, [2010] 9 W.W.R. 121, 485 A.R. 98 at para.243