

Caught Red-handed: Litigation Against Attorneys in Trouble

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Enduring Powers of Attorney and Personal Directives

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INTRODUCTION

Wilma, a widow, has recently had her Enduring Power of Attorney (“EPA”) invoked after a medical review with her physician deemed her to have lost capacity and no longer able to manage her financial affairs. Luckily, she had such documents drafted a few years ago when she visited her lawyer after her late husband, Fred, passed away. Wilma has one child, a daughter named Pebbles, whom she sees frequently and has a good relationship with. Pebbles is the named attorney under the EPA and has been informed that she will manage her mother’s financial affairs and take care of her. Pebbles has never acted as an attorney and had to research online what the term meant. She cannot imagine it being that difficult of a role to fill, as she is very close with her mother.

The above fact pattern is one that seems to be the typical scenario when individuals find themselves appointed as an attorney under an EPA. Under the *Powers of Attorney Act* (the “POA Act”),¹ an EPA can either come into effect immediately upon signature, or can “spring” into effect by incapacity or a declaration by the donor.² Although that may seem straightforward, there are numerous duties that an attorney owes to the donor and serious consequences arise if they fail to perform those duties. There are provisions in legislation to address the rights of a donor when breaches have occurred, but there are no preventative safeguards to preclude breaches from occurring.

The purpose of this paper is to identify the abuses of the attorney’s duties to the donor, what are the outcomes for dealing with those abuses, and the potential process for remedying these abuses. By way of exploring this, we will address different examples and how they apply to the current case law and legislation in place in Alberta.

An excellent paper reviewing the theory and background in this subject is by Paul J Dunn, *Going Rogue: The Misuse of Enduring Powers of Attorney and What to do About It*, prepared for the Legal Education Society of Alberta for presentation February 17 & 24, 2010.

WHAT ARE THE DUTIES OF AN ATTORNEY?

Although not explicitly stated in the POA Act, case law suggests attorneys are deemed trustees and, therefore, owe the same fiduciary duties. In *MacDonald v Taubner*,³ the Court stated that an attorney

1 R.S.A. 2000, c. P-20 [POA Act].

2 *Ibid*, s. 5(1): “An enduring power of attorney may provide that it comes into effect at a specified future time or on the occurrence of a specified contingency, including, but not limited to, the mental incapacity or infirmity of the donor”.

3 2007 ABQB 60 at 195, 55 E.T.R. (3d) 65 [MacDonald].

acting under an EPA is in a fiduciary relationship, which imposes “obligations and duties” of a trustee upon the attorney.⁴

Further, in *Budgell v Hartley Estate*,⁵ the Court suggested that “[t]here appears to be a higher duty on an attorney acting under an enduring power of attorney following the event of the donor’s incapacity. The attorney is no longer acting strictly as agent, but as trustee.”⁶ Although fiduciary duties of agents, attorneys and trustees “may vary in intensity, their duties are ultimately the same”.⁷ The Court in *MacDonald*, stated that it is settled law that attorneys are held to the same “standard of care” of what a trustee is generally held to and must act as a reasonable and prudent business person when performing such duty.⁸ Similarly, the Court reaffirmed the standard of care and diligence that is required of a trustee, which is one of “ordinary prudence in managing his or her own affairs, and that this standard of care must be discharged with honesty, objectivity and care.”⁹

Therefore, an attorney has a fiduciary duty to act in accordance with the authority granted by the donor and owes a variety of duties to the donor under the EPA¹⁰, including the duty to act loyally, honestly, in good faith, and in the donor’s best interests.¹¹ Their loyalty is to the donor alone and under an EPA, the attorney has the authority to do anything on behalf of the donor and may exercise that authority in a variety of ways.

The general duties of an attorney are summarized in *Lander v Lyall*,¹² as follows:

- “(i) putting the donor’s welfare first when taking any steps with respect to the donor’s property;
- (ii) taking the wishes of the donor into account;

4 *Ibid* at 245 citing *Brown v. Lefebvre*, 2007 ABQB 195 (Alta. Q.B.); *Ericksen, Re*, 2008 ABQB 587 (Alta. Q.B.) *et al.*

5 2008 MBQB 202, 168 A.C.W.S. (3d) 895 [*Budgell*].

6 *Ibid* at 27.

7 *MacDonald*, *supra* note 3 at 243 citing M. Jasmone Sweatman, *Guide to Power of Attorney*, (Toronto: Canada Law Book, 2002) at 6.

8 *Ibid*, at 251 citing *Ericksen, (Re)*, 2008 ABQB 587 (Alta. Q.B.) *et al.*

9 *Ibid*, at 252 citing *Stein v. Van Eldik*, 2006 ABQB 160 (Alta. Q.B.) at 18-19.

10 *Ericksen, (Re)*, 2008 ABQB 587, at 17, 169 A.C.W.S. (3d) 470 [*Ericksen*] citing *Egli (Committee of) v. Egli*, 2004 BCSC 529, 28 B.C.L.R. (4th) 375 (B.C. S.C.), *aff'd* 2005 BCCA 627, 262 D.L.R. (4th) 208 (B.C. C.A.).

11 *Brown v. Lefebvre*, 2007 ABQB 195, at 20, 159 A.C.W.S. (3d) 312 [*Brown*] citing Ian M. Hull, *Power of Attorney litigation*, (Toronto: CCH Canadian Ltd., 2000) at 17-18.

12 2006 MBQB 170, 27 E.T.R. (3d) 21 [*Lander*].