Drafting Enduring Powers of Attorney to Protect Donors and Avoid Elder Abuse

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DRAFTING ENDURING POWERS OF ATTORNEY TO PROTECT DONORS AND AVOID ELDER ABUSE

Much of the law is geared around the overarching principal that presumes an adult is capable of making their own decisions (*sui juris*) unless the contrary is determined or unless such adult knowingly allows and authorizes another individual to make decisions on the adult's behalf.

The focus of this paper is not on guardianship or trusteeship matters once an adult is deemed to be mentally incapable of making decision over their own affairs. The focus is on enduring powers of attorney and drafting these documents on behalf of our clients in order to reduce or mitigate areas of abuse.

For those of us who have a wills and estate practice, it is often easy to overlook the enduring power of attorney as the poor cousin of the more glamourized Will. Often, we see little thought put into drafting this powerful document that is relegated to boilerplate status. However, it behooves us to spend more time and give more thought to how this document can impact our clients, especially once the document is invoked.

Such an Enduring Power of Attorney (EPA) provides legal authority to an attorney to administer a donor's financial affairs, as well as direction on how to do so. According to the Western Canada Law Reform Agencies Report on Enduring Powers of Attorney, the objective of EPA legislation is:

> "...to provide a relatively simple yet effective method by which an individual can arrange for the administration of the individual's property and affairs by one or more trusted persons in the event that the individual becomes mentally incapable of doing so sometime in the future."[1]

As noted by Somers J. in *Glen v. Brennan*, courts prize an enduring power of attorney because it "is simpler to deal with and gives the donee more flexibility in dealing on behalf of the donor." Thus, Courts will require "strong and compelling evidence of misconduct or neglect" by the attorney before a court terminates a power of attorney.[2] And as highlighted by Lois J. MacLean in her LESA paper titled "Common Problems for Donors and Attorneys" (2016), [3] EPAs are drafted from the perspective of assisting the attorney with as much *flexibility* as possible.

EPA legislation, case law and drafting practices may therefore focus too heavily on flexibility and too little on preventing elder abuse. Elder abuse may include, but is not limited to, illegal or improper use

[1] Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Final Report (2008).

[2] *Glen v. Brennan*, [2006] O.J. No. 79.

[3] "Common Problems for Donors and Attorneys" presented by Lois J. MacLean.

of the donor's money or belongings for personal use. It is reported that between 4 per cent and 8 per cent of elders in Canada are likely to experience abuse.[4]

This paper presents an EPA case study that considers the provisions of an EPA precedent with a new focus through the lens of elder abuse risks. By shifting the focus from flexibility to donor protection, the paper gives new direction on providing proactive and preventive measures in EPA drafting to prevent mis-dealings against elders. The paper will go through some typical EPA clauses to identify the potential for elder abuse and address how elder abuse can be avoided to better protect donors.

CAPACITY OF THE DONOR

It is imperative as the drafting lawyer to ensure that your client has the mental capacity to understand what the enduring power of attorney means and the effects of signing same. Often this becomes the very issue that family members dispute … whether the Donor had the wherewithal to understand the documents they were signing and whether they signed it of their own volition, without coercion or undue influence by other parties.

Where our clients are elderly or vulnerable, we have to be extra diligent in our duties. Meeting with the client in the absence of other family members or outside influences is recommended, as well as obtaining medical opinions from the client's long-time physician, getting to know the client and asking questions about their family members and the dynamics at play. Understanding the financial picture is also key.

Section 3 of the Power of Attorney Act says:

> 3. An enduring power of attorney is void if, at the date of its execution, the donor is mentally incapable of understanding the nature and effect of the enduring power of attorney.

The case of *Midtdal v. Pohl* 2014 ABCA 646 at para 91-93 summarizes the test for capacity:

> Hoffman J. held that it was not necessary for the donor to be capable of managing his or her property and affairs on a regular basis. Capacity to execute the power of attorney would be established if the donor understood that:
>
> (a) The attorney would be able to assume complete authority over the donor's affairs;
>
> (b) The attorney could do anything with the donor's property that the donor could have done;

[4] Alberta Government, *Addressing Elder Abuse in Alberta: A Strategy for Collective Action* (2010).