



Canadian Conference on Elder Law  
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## **Financial Abuse, Neglect and the Power of Attorney**

Kimberly Whaley and Amy Cull, Whaley Estate Litigation

Ian Hull, Hull & Hull LLP

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## A. Introduction

- Changing demographics render the law as it affects older individuals increasingly important.
- Older individuals can be and are particularly prone to legal abuses.
- Legal abuse of older adults can take many forms where the abuse of trust involves a **legal instrument and construct**.

### THE POA: A Useful Planning Tool

- There is a widely held view that the Power of Attorney document (the “**POA**”) is a good thing in that:
  - It can protect a grantor’s health and/or financial interests by enabling them to plan for when they become ill, infirm, or incapable of making decisions;
  - It can minimize family conflict during the grantor’s lifetime;
  - It can prevent unnecessary, expensive and avoidable litigation;
  - It can provide a means for attorneys to provide the physical, emotional and financial care that their vulnerable loved ones need;
  - It can provide a means for attorneys to protect the grantor against predators, of which there is a **very real risk**.

### THE POA: A Dangerous Instrument?

- There can be dark side to the POA document.
  - Grantors are often unaware of the extent of the powers bestowed;
  - Attorneys do not always do the job or fulfill their legal duties;
  - Attorneys cannot always be trusted to act in an honest and trustworthy manner.
  
- There is an extremely high risk that a vulnerable older adult or incapable person may fall victim to abuse ***because of*** the POA document, the chosen Attorney, or the predatory Attorney who obtains the POA through abuse and/or deceit for exploitive purposes.
  
- It is in this way that a POA can be used to the detriment of the very individual who granted the power.

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### **B. What is a Power of Attorney?**

- A POA is an instrument that facilitates the maintenance or control over one's affairs by enabling the grantor of the power to plan for an extended absence, infirmity, and even incapacity.
  
- In Ontario, there are three (3) types of POAs:
  1. **the general form of a POA** which is made in accordance with the *Powers of Attorney Act*, R.S.O. 1990, c. P. 20;
  
  2. **the Continuing POA for Property** (or "**CPOAP**"), pursuant to the provisions of the *Substitute Decisions Act* (the "**SDA**"); and
  
  3. **the POA for Personal Care** (or "**POAPC**") pursuant to the provisions of the *SDA*.

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- A POA for **Property** can be used to grant:
  - a specific/limited authority;
  - a general authority granting the power to do all that are permissible under the governing principles and legislation; and
  - a continuing authority which survives subsequent incapacity.
- A POA for **Personal Care** can be used to grant powers exercised during incapacity only.

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### C. Selecting the Right Attorney

- Probably the most important advice that we, as practitioners, could give to a grantor of a CPOAP or a POAPC is to **carefully choose** their attorney(s).
- The most important characteristics that should be attributed to a chosen attorney(s) should be **honesty, integrity, and accountability.**

### D. The Continuing Power of Attorney for Property

- A Continuing Power of Attorney for Property (or “**CPOAP**”) is commonly used to ensure that the **financial affairs** of a person are looked after in circumstances where that person is unable to look after them on their own.
  
- Pursuant to the *SDA*, a POA for Property is a CPOAP if:
  1. the document states that it is a continuing power for attorney; or
  2. the document expresses the intention that the authority given may be exercised during the grantor’s subsequent incapacity to manage property.



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### E. The Power of Attorney for Personal Care

- A Power of Attorney for Personal Care (or “**POAPC**”) enables the (capable) grantor to appoint a person(s) to make personal care decisions on their behalf in the event that they are found to be incapable of being able to do so on their own.
  
- A grantor is considered incapable of their personal care if they are unable to understand information relevant to:
  - health care, nutrition, shelter, clothing, hygiene or safety; or
  
  - they are unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision respecting same. Page 9

### E. The Power of Attorney for Personal Care

- There are limitations on who a grantor may appoint to act as their attorney pursuant to a POAPC.
- The SDA prohibits a person who provides health care, or residential, social, training or support services to the grantor **for compensation** from acting as an Attorney for Personal Care, **unless the Attorney is the spouse, partner or relative of the grantor**, in which case they are permitted to act.

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### E. The Power of Attorney for Personal Care: Making Decisions

- When making decisions on an incapable person's behalf, the Attorney for Personal Care is required to make those decisions
  - in accordance with the *SDA*;
  - in accordance with the *Health Care Consent Act, 1996* (the "HCCA"), where decisions involve consent to treatment;
  - in accordance with the last capable wishes or instructions of the incapable person; and/or
  - If there is no last capable wish that would apply in the circumstances, to act in the incapable person's **best interests** as guided by the HCCA, the SDA and at common law.

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### E. The Power of Attorney for Personal Care: Best Interests

- To act in the incapable person's **best interests**, the attorney must consider:
  - the values and beliefs of the grantor in question;
  - the grantor's current wishes, if ascertainable;
  - whether the decision in question will improve the grantor's standard and quality of life; and
  - whether the benefit of a particular decision outweighs the risk of harm to the grantor from alternate decisions.

### F. Duties of Attorneys - General

- An Attorney is a **fiduciary** who is in a **special relationship** of trust with the grantor.
- As a result of this special relationship, the common law imposes obligations on what an attorney acting as a fiduciary may do.

### F. Duties of Attorneys - The Specific Duties of an Attorney for Property

- One of the more important duties of an Attorney for Property is manage the grantor's property in a manner that is consistent with decisions for the person's personal care.
- See Whaley Estate Litigation checklist.

### F. Duties of Attorneys - The Specific Duties of an Attorney for Personal Care

- Some of the more important duties of an Attorney for Personal care are:
  - Exercise powers diligently and in good faith; and
  - Keep thorough and detailed records of any and all decisions taken, including a comprehensive list of health care, safety, shelter decisions, medical reports or documents, names of persons consulted, dates, reasons for decisions being taken, record of the incapable person's wishes, and so on.
- See Whaley Estate Litigation checklist.

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### G. Attorney Disasters: What Can Go Wrong?

- Issues that frequently arise with respect to Attorneys for Personal Care and for Property:
  - Disputes and accounting discrepancies concerning: the specific dates upon which the POA document became effective; the date of incapacity of the grantor; and the extent of the Attorney's involvement;
  - Disputes regarding whether it was the grantor, or the Attorney, who was acting at any given stage;
  - Whether the Attorney has made unauthorized, questionable or even speculative investment decisions, or decisions lacking in diversity;

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### G. Attorney Disasters: What Can Go Wrong? (cont'd)

- Whether the Attorney has taken into consideration the tax effects of the Attorney's action or inaction;
- Whether the Attorney has acted in a timely fashion in attending to financial matters which may have contributed to unnecessary expenses, or damages from inaction;
- Whether the Attorney has sought professional advice where deemed necessary or appropriate;
- The Attorney's treatment of and dealings under jointly held assets or accounts;
- Attorney disputes between siblings regarding the capacity, action\inaction, of a parent\grantor;

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### G. Attorney Disasters: What Can Go Wrong? (cont'd)

- Attorney disputes among step-children, children of prior relationships, subsequent spouse\partner;
- Attorney misappropriation of grantor's assets;
- Incapacity of a grantor to grant a POA and/or POA secured by a predator with mal-intent;
- POA obtained from a vulnerable or physically dependent grantor by an individual with improper motives, seeking personal gain, as a result of the exerting of undue influences, or suspicious circumstances;
- Disputes where one or several Attorneys have acted without the knowledge or approval of the others either under a Joint, or Joint and Several, POA.

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### H. Attorney Abuse:

- Three common scenarios in which a POA can be used to the detriment of an older adult who is vulnerable or dependent are:
  1. Where the POA is fraudulently-procured, for the sole purpose of abuse and exploitation;
  2. Where the POA is fraudulently-used, for the sole purpose of self-interest of the Attorney; and
  3. Where the POA is imprudently used and/or used in a way that constitutes a breach of fiduciary duty.

### I. Real-life Examples Extracted from Our Growing Collection of Case Law

#### (1) POAs fraudulently-procured, for the sole purpose of abuse:

- ***Re Koch, Koch, Re***, 1997 CarswellOnt 824, (Ont. Gen. Div.); Additional reasons in: *Koch, Re*, 1997 CarswellOnt 2230 (Ont. Gen. Div.).
- ***Bishop v. Bishop***, 2006 CarswellOnt 5377.
- ***Dhillon v. Dhillon***, 2006 CarswellBC 3200 (B.C. C.A.).

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### (2) POAs fraudulently-used, for the sole purpose of self-interest

- ***Elford v. Elford***, 1922 CarswellSask 162 (S.C.C.).
- ***Burke Estate v. Burke Estate***, 1994 CarswellOnt 442.
- ***Westfall v. Kovacec***, [2001] O.J. No. 3942 (Ont. S.C.J.).

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### (3) POAs imprudently used and/or used in a way that constitutes a breach of fiduciary duty

- ***Chu v. Chang***, 2009 CarswellOnt 7246 (Ont. S.C.J.); *Chu v. Chang*, 2010 CarswellOnt 246, (Ont. S.C.J. Jan 12, 2010); *Chu v. Chang*, 2010 CarswellOnt 1765, (Ont. S.C.J. Mar 26, 2010).
- ***Abrams v. Abrams***, 2008 CarswellOnt 7786 (Ont. S.C.J. Dec 19, 2008); Additional reasons in: *Abrams v. Abrams*, 2009 CarswellOnt 524 (Ont. S.C.J. Feb 03, 2009); affirmed by: *Abrams v. Abrams*, 2009 CarswellOnt 3618, 2009 ONCA 522 (Ont. C.A. Jun 25, 2009).
- ***Teffer v. Schaefers***, CarswellOnt 5447, 93 O.R. (3d) 447 (Ont. S.C.J. Sep 12, 2008); Additional reasons in: *Teffer v Schaefers*, 2009 CarswellOnt 2283 (Ont. S.C.J. Apr 06, 2009).
- ***Fiacco v. Lombardi***, 2009 CarswellOnt 5188.

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### (3) POAs imprudently used and/or used in a way that constitutes a breach of fiduciary duty

- ***Woolner v. D'Abreau***, *Woolner v. D'Abreau*, 2009 CarswellOnt 664 (Ont. S.C.J. Feb 10, 2009); Leave to appeal allowed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6480 (Ont. Div. Ct. Aug 10, 2009); AND Reversed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6479 (Ont. Div. Ct. Sep 29, 2009).
- ***Down Estate v. Racz-Down***, *Down Estate v. Racz-Down*, 2009 CarswellOnt 8128 (Ont. S.C.J. Dec 14, 2009); additional reasons in *Down v. Racz-Down*, 2010 CarswellOnt 3662, 2010 ONSC 2575 (Ont. S.C.J. May 03, 2010).
- ***Zimmerman v. McMichael Estate***, *Zimmerman v. Fenwick*, 2010 CarswellOnt 5179, 57 E.T.R. (3d) 241, 2010 ONSC 3855 (Ont. S.C.J.).
- ***Jurgen Fritz Zimmerman (Criminal Proceedings)***
- ***Bosch v. Bosch***, 2010 ONSC 1352
- ***Zisko v. Miksche***, 2007 CarswellOnt 7162.

### J. Conclusion: Awareness & Prevention

#### J. Awareness & Prevention

- Solicitors, planners, legislators, health care practitioners, bankers, investors, accountants, the police and the public at large, must be alert to the possibility of fraudulently obtained and fraudulently used POA documents and the risks to the older adult and to the cognitively impaired, the vulnerable, the dependant, those under disability physically and the incapable.
  
- To that end, we advise the following tips:
  1. Exercise Caution
  2. Be vigilant, aware and alert to the possibility of abuse
  3. Make inquiries until you are satisfied
  4. Consult a professional



### K. Resources

- The Advocacy Centre for the Elderly
- Whaley Estate Litigation (*see Elder Law and Elder Abuse Links*)
- The Toronto Police Community Mobilization Unit, Vulnerable Persons Issues
- The Public Guardian and Trustee
- The Ontario Network for the Prevention of Elder Abuse (Senior Safety Line)
- **Whaley Estate Litigation Checklists**