



WILL POWER CORRUPT?

Avoiding Elder Abuse by a Rogue “Attorney”*

// Power tends to corrupt, and absolute power corrupts absolutely.”

LORD ACTON

As most readers will know, a Power of Attorney is a legal document giving power from one person (the Adult) to someone else (called the *Attorney) to deal on his or her behalf regarding the Adult’s legal or financial affairs.

The powers can either be general powers for an Attorney to do anything you can do (other than make a Last Will) or specific/limited powers—for example, close a real estate deal for you while you’re down south.

- An “enduring clause” allows the Attorney either to continue to act when, or to start to act if, the Adult becomes incapable.
- The former could be called an “enduring” and the latter could be called a “springing” Power of Attorney.
- In either of those cases, the document is usually referred to as an Enduring Power of Attorney (EPOA).
- Most of the Powers of Attorney created today are EPOAs rather than general or limited. We will use the term EPOA throughout this article to refer to a Power of Attorney.

Along with a Representation Agreement—a similar document appointing a Representative to make decisions regarding personal and medical care, an EPOA is a very useful advance planning tool. Advance planning is done to protect people when they later become no longer able to look after their own affairs or speak for themselves. Although easy to create, EPOAs are very powerful documents and have been called a licence to steal.

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At the BC Centre for Elder Advocacy and Support, we respond and work to prevent elder abuse. The most common form of elder abuse is financial abuse. An Attorney appointed under an EPOA may abuse his or her power or go *rogue*, as Sarah Palin would say.

There may be a number of reasons for this.

- The document may have been created in questionable circumstances.
- The wrong person may be chosen to be the Attorney.

- Often that Attorney was appointed with very little or no information about the Attorney’s role and responsibilities.
- Family members chosen as Attorneys may believe they are “entitled” to help themselves to some of the money, either because a lot is being demanded of them or because they believe they are going to inherit it later anyway, so why not take some now?
- Some people simply behave badly when there is money around for the taking and no one is looking . . .

Dealing with the aftermath of an Attorney going rogue can present serious challenges. A capable Adult can revoke a Power of Attorney and sue for return of the ill-gotten gains. In some cases you can criminally charge an Attorney and seek “restitution” (See “Dealing with the Rogue Attorney.” www.cle.bc.ca/PracticePoints/WILL/10-RogueAttorney.htm)

The Public Guardian and Trustee (PGT) for BC has an Assessment and Investigation Service that has the power, in the case of an incapable Adult, of revoking a Power of Attorney, demanding accounting, freezing bank accounts, and so on. Application can be made to the BC Supreme Court

to terminate an EPOA under the new section 36 of the *Power of Attorney Act* and ask for return of monies misappropriated. But all that may be closing the barn door after the horse has left; the money may be long gone and not recoverable.

We want to review some of the steps your legal representative will take when asked to create an EPOA for you, to help guard against potential abuse.

- Preliminary considerations that will be covered in an interview
- Things that should be included in the document when drafted
- Recommendations regarding handout materials to go along with the document

First, we want to review some recent legislative changes that were intended to lessen the chances of an Attorney going rogue.

Legislative Changes

A package of legislative changes occurred in September 2011, dealing with advance planning issues and documents—Representation Agreements, Advance Directives, and Powers of Attorney. Two new parts were added to the *Power of Attorney Act*—over 30 sections—relating to the duties and powers of Attorneys, and operations of EPOAs. They were largely intended to minimize the possibility of an Attorney going rogue.

The new parts include the following.

1. “Statutory test” for capability of the Adult to grant an EPOA
2. Limits on who can be appointed Attorney: Paid caregivers are prohibited
3. Attorney to sign the document in front of witnesses (to acknowledge he or she has a positive duty to act)
4. Annual limits on gifts, loans, and charitable donations
5. Listing of legal duties of Attorney (section 19) and their powers (section 20)
6. Record-keeping responsibilities for Attorney

7. Reporting abuse or neglect and protection for whistle-blowers
8. Remedies available and jurisdiction of court
9. Process for changing, revoking, and terminating the EPOA

Some of those provisions were always understood to be the law. But they have been specifically spelled out in the statute now, to add clarity and certainty. Other statutory duties or powers have been created for the first time; some are mandatory and some can be modified by specific terms in the EPOA.

Your legal representative needs to ensure you are capable of making the Power of Attorney document.

Preliminary Considerations

Capability

Your legal representative needs to ensure you are capable of making the Power of Attorney document. As mentioned, the 2011 amendments set out a “statutory test” for whether an Adult is mentally capable of creating a valid Power of Attorney. There are presently six parts to the test. The Adult must understand the nature and consequences of the proposed EPOA and specifically understand the following.

1. The property the Adult has and its approximate value
2. The obligations the Adult owes to his or her dependants
3. The fact that the Adult’s Attorney will be able to do, on the Adult’s behalf, anything in respect of the Adult’s financial affairs that the Adult could do if capable, except make a Will, subject to the conditions and restrictions set out in the EPOA
4. The fact that unless the Attorney manages the Adult’s business and property prudently, their value may decline
5. The fact that the Attorney might misuse the Attorney’s authority

6. The fact that the Adult may, if capable, revoke the EPOA

At the present time, the Regulations have no other “prescribed” matters.

Your legal representative would go through each of the six points, discussing them with you or asking you to restate them in your own words.

- What if there is some question of your capability to understand some or all of these points?
- Are you lacking mental capacity?

Some legal representatives have received little training on how to conduct an assessment of capability.

While mental capability may seem to be a medical determination, in this case it is a legal determination that must be made by your legal representative or ultimately a judge. A medical opinion or assessment can assist in this process, but cannot on its own decide the matter. The American Bar Association, in conjunction with the American Psychological Association, has put out a useful handbook and tool for your legal representative to assess your capability. It is available here. <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>

Undue Influence

Your legal representative will want to ensure that you are not under any “undue influence” when granting such power to someone else over your financial and legal affairs. The need to avoid undue influence when creating a Power of Attorney is not spelled out in the legislation. Section 34 sets out that one of the reasons someone may report to the PGT for an investigation is when “Fraud, undue pressure or some other form of abuse or neglect is being or was used to induce an Adult to make, change or revoke an Enduring Power of Attorney.”

The British Columbia Law Institute, featured in the Cover Story interview of this magazine, has developed a tool for legal representatives who are creating Last Wills—a checklist and set of red flags to ensure undue influence isn’t affecting the will-maker when

Alternatives to Enduring Powers of Attorney

Section 7 Representation Agreement

An Adult who is not capable of making an EPOA might still be capable of making a section 7 Representation Agreement (RA), which can give the Representative the powers to deal not just with personal care and medical care matters but also “routine financial management.” This includes most legal and financial matters other than matters that create longer-term financial obligations—loans, mortgages, credit cards, etc. See section 2 of the Regulation to the *Representation Agreement Act* for what is included. The “statutory test” for capability for a section 7 RA is less onerous—the Adult can be capable of making a section 7 Representation Agreement even though he or she is incapable of making a contract; of managing health care, personal care, or legal matters; or the routine management of financial affairs. See section 8 of the *Representation Agreement Act* for the statutory capacity test. Note that a section 7 RA does not deal with end-of-life matters. That requires a section 9 Representation Agreement with a higher standard of capability.

Pension Trusteeship, to assist a senior with uncomplicated finances

If the senior’s only source of income is Federal Income Security Programs (OAS/ CPP), and they just pay rent, food, and utilities, a pension trusteeship may be all that is needed. A capable family member or friend can sign up with Income Security Programs to receive the senior’s pension funds as trustee to pay the rent and bills.

Committee (Pronounced Kaw-mit-tay)

If the Adult is incapable of making either an EPOA or section 7 Representation Agreement, and the matter is more complicated than just managing OAS/ CPP income, a concerned family member or friend would have to apply to court to be appointed as the “legal guardian” or “conservator” of the Adult’s estate (known in BC as “Committee (kaw-mit-tay) of the Estate”). That is an expensive and time-consuming process. The Public Guardian and Trustee (PGT) may be appointed as Committee of the Estate as a last resort, either by the court or a by “Certificate of Incapability” under the *Patients Property Act*.

Trust Agreement

An Adult with an EPOA can continue to act unilaterally until found to be incapable. Often times, an older Adult, while not incapable, may be quite vulnerable to undue influence or overreaching by family members, friends, or others.

We have seen many capable older Adults who are simply unable to say no to a child demanding more and more money or who is demanding to be put on title of a property. Guilt or embarrassment may also be a factor.

A properly drafted trust agreement, rather than an EPOA, can put all of the Adult’s property and income in trust, which can provide a “wall of protection”—the Adult can no longer act unilaterally; the trustee will say “no” in the Adult’s stead. A trust agreement maintains very private and secure control and management of a person’s assets and affairs; an EPOA will be cancelled if a Committee is appointed, which can result in the intervention of a relative you would have never chosen or the intervention of the PGT.

A trust agreement can also provide more comprehensive terms of the trustee’s specific duties and powers than an EPOA, including a framework for management of property. A trust can survive death, ensuring uninterrupted management of affairs, while an EPOA ends at the death of the Adult. There are various other tax and planning benefits to a trust, beyond the scope of this article.

instructing about the contents of the Will. The checklist and the red flags are easily adapted to be used to avoid undue influence in the creation of EPOAs. It is available here. http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf

Choosing the Attorney

A crucial part of the process in creating an EPOA is a discussion about who should be appointed. Your legal representative will advise that you need to **implicitly trust** the person to whom you handing over your affairs. In a worst-case scenario, that designated individual can clean out your bank account and abscond to another jurisdiction, leaving you penniless.

- Given the record-keeping and reporting requirements, when choosing children or friends to be your Attorney, we recommend you select a “fastidious nerd” over a “sloppy klutz,” assuming they are equally trustworthy.
- You may think you want to be “fair” by appointing more than one friend or family member to act jointly. You may think it will help ensure some “oversight” to have more than one person involved. You should think long and hard about that. Will it work in practice? You may be setting up your friends or loved ones for an ongoing, potentially divisive struggle.
- Will the EPOA say the Attorneys must act independently or only jointly? (The “default” in the legislation, subject to what the EPOA says, is that they must act unanimously.)
- Will all the individuals be available when required?
- How will decisions be made?
- If there are conflicts, how will they be resolved?

Consider naming only one trusted person as your Attorney. To keep “peace in the family,” consider naming another as an alternate Attorney. A third person could be named your

Representative under a section 9 Representation Agreement regarding health and personal care. Having an alternate Attorney named is a good idea where possible, in case the first Attorney has predeceased the Adult or is unable or unwilling to serve.

Restrictions on Attorneys

As mentioned, certain people are not permitted to be your Attorney. That is another way to ensure there was no undue influence when the document was created.

To protect vulnerable Adults in institutions, your Attorney cannot be someone who provides personal care or health care services to you for compensation, including an owner, operator, employee, contractor, or volunteer of a licensed facility in which you reside and through which you receive personal care or health care services (*Community Care and Assisted Living Act*). The exception is if the individual is your child, parent, or spouse.

Drafting Considerations

Compensating the Attorney

Acting as an Attorney can be a lot of work—paying bills, banking, appearing in court, record-keeping, reporting. Many Attorneys, especially family members, do this work for free. You have a choice as to whether your Attorney will be paid for the work. Providing for some compensation may prevent your Attorney from deciding to pay him or herself under the table as “deserved” compensation. On the other hand, setting out some compensation in the document may make the Attorney inclined to take more. For larger estates, often the annual compensation will be a percentage of the money managed.

Note that even if you stipulate that your Attorney is **not** to be compensated for acting as your Attorney, the person can still be reimbursed from your money for reasonable expenses properly incurred in acting as your Attorney, for example, fees paid, reasonable required travel expenses, and other necessary “out-of-pocket” expenses.

Reporting to Others?

Your Attorney’s only legal obligation is to report or account to you and to the PGT or the court, when required. Other concerned family members or friends cannot force your Attorney to account to them. Your legal representative might advise a clause in the EPOA that the Attorney has a duty to report to or render accounts to the people you specify. That will help ensure some ongoing oversight and prevent things taking a turn for the worse.

You will be doing your Attorney a great favour if you prepare an inventory and financial accounting yourself...

Gifts

Gifts are an important tool in many estate plans. That area is ripe for abuse, however. The legislation limits gifts to \$5000 per year, unless otherwise stated in the EPOA.

Investments

Investments is another area that could lead to abuse. The legislation now states that an Attorney can invest only in the type of investments in which a trustee would invest under the *Trustee Act*, unless otherwise stated in the EPOA.

Subsequent Considerations

Roles and Responsibilities

Your Attorney should appreciate the task he or she is taking on and the legal responsibilities and duties.

We recommend that every newly signed Power of Attorney document given to an Attorney should include information on the roles and responsibilities of an Attorney. An example of such a document can be found at the Nidus website: http://www.nidus.ca/PDFs/Nidus_Info_Role_Attorney.pdf. Notary Laurie Salvador, with Salvador Davis and Company in Sidney, BC, has created a useful handout on the Responsibilities and Requirements of an Attorney. www.salvador-davis.com

Inventory/Records

The amendments to the Act have strengthened the record-keeping and reporting requirements of Attorneys, which will help prevent abuse. When the time comes for your Attorney to take over your affairs, the person is required to prepare an inventory of your assets and liabilities. Then while acting, the Attorney must keep the following records.

- A current list of your property and liabilities, including an estimate of their value, if it is reasonable to do so
- Accounts and other records respecting the exercise of the Attorney’s authority
- All invoices, bank statements, and other records necessary to create full accounts respecting the receipt or disbursement, on your behalf, of capital or income

You will be doing your Attorney a great favour if you prepare an inventory and financial accounting yourself, if you haven’t already—ideally in an “electronic spreadsheet.” Keep it updated for your Attorney to take over when the need arises. An updated listing of where all your important documents can be found will also be very useful to help your Attorney get started with the record-keeping and reporting duties. It is also a good impetus for you to finally “get your affairs in order”!

Conclusion

We have set out some of the things to be considered in creating an EPOA, to hopefully avoid any misuse or abuse by an Attorney going rogue.

To summarize, the legislation now provides more clarity and protection. Your legal representative will also help protect you and your property by

- ensuring you are capable and not “under influence”;
- helping you choose the right person(s) as Attorney;
- putting necessary terms and conditions in the EPOA; and
- ensuring your Attorney knows his or her roles and responsibilities.



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and feel great about the lives you'll save

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Many other matters not covered by this article should be reviewed when preparing an EPOA. Special requirements for EPOAs will be used for real estate transactions, for example, the Land Title Office will review the signing and required certification. Reference should always be made to the *Power of Attorney Act*, available under the "Laws" tab here: <http://www.bclaws.ca/>.

Other resources to consider reviewing are set out in the list below.

BCCEAS Seniors Abuse & Information Line

Telephone: 604 437-1940
Toll free: 1-866-437-1940
admin@bcceas.ca
www.bcceas.ca ▲

Kevin Smith is a staff lawyer with the BC Centre for Elder Advocacy and Support (BCCEAS), a nonprofit organization that works to prevent and end elder abuse.



We never met, but you saved my life.

You lifted me out of 40 years of addiction and gave me a second life. Today, I honour your legacy through my actions. I am now sober and happily married. I became a man who loves God, a published poet, and once again, a father to my daughters.

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I thank God for you, every day.*

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Other Resources

Nidus: Numerous fact sheets on EPOAs from the Nidus website. http://www.nidus.ca/?page_id=68

Attorney General of BC: Incapacity planning page. <http://www.ag.gov.bc.ca/incapacity-planning/> (This page includes a downloadable PDF version of an EPOA with instructions for completion.)

Public Guardian and Trustee booklet on advance planning: "It's Your Choice." http://www.trustee.bc.ca/pdfs/STA/It%27s_Your_Choice-Personal_Planning_Tools.pdf

Ministry of Health booklet on advance care planning: "My Voice." <http://www.health.gov.bc.ca/library/publications/year/2012/MyVoice-AdvanceCarePlanningGuide.pdf>

Canadian Bar Association fact sheet on Power of Attorney and Representation Agreement. http://www.cba.org/bc/public_media/wills/180.aspx (Also available in simplified Chinese, Mandarin, and Punjabi)