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ESTATE LITIGATION—2009 UPDATE
PAPER 7.1

Dealing with the Rogue Attorney

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DEALING WITH THE ROGUE ATTORNEY

I. Introduction

A power of attorney is an instrument under which a donor, either an individual or a corporation, grants another party the authority to act on the donor's behalf in respect to the donor's legal and financial affairs, or a specific portion of those affairs.[1] It is essentially a form of agency, although of more unilateral nature than a typical agency relationship.[2]

The flexibility of the governing legislation, the *Power of Attorney Act*,[3] allows creativity in the use of powers of attorney, which in turn makes them a popular estate planning tool. With that flexibility, however, comes the risk of issues and litigation arising over actions undertaken by an attorney pursuant to that power. Like any estate planning instrument, powers of attorney are often the center of family disputes, and issues surrounding the capacity of the donor and the conduct of the attorney are often the subject of litigation.

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1 Thériault, Carmen, "Powers of Attorney—Some Fundamental Issues," (1999) 18 E.T.P.J. 228 and *British Columbia Estate Planning and Wealth Preservation*, looseleaf (Vancouver: The Continuing Education Society of British Columbia Estate, 2004-) at 13.3.

2 Thériault, *ibid.* at 228 and 229.

3 R.S.B.C. 1996, c. 370.

Financial abuse of the elderly is becoming more prevalent. With the rising rates of dementia, the assets of the ageing population can be subjected to mismanagement and abuse by family members and third parties. Examples of the sorts of issues that can arise concerning attorneys include:

- the attorney's treatment of and dealings under jointly held assets or accounts;
- attorney misappropriation of the donor's assets;
- attorney disputes between siblings regarding the capacity\incapacity or action\inactions of a parent\donor;
- disputes regarding whether it was the donor, or the Attorney, who was acting at any given stage.

This paper sets out the basic principles governing powers of attorney, and identifies some of the issues which can arise when an attorney, through either ignorance or deliberation, mis-uses the authority granted by a power of attorney.

A. General

At its broadest, a power of attorney grants the attorney authority over the legal and financial affairs of the donor. The scope of this authority has been described by Mr. Justice Clancy in *Desharnais v. Toronto Dominion Bank*[4] as authorizing the attorney "to do anything that [the donor] could have done provided she acted lawfully." This statement, though simplistic, is perhaps too broad. As discussed below, a power of attorney is subject to several common law restrictions. It cannot, for example, confer authority over the donor's personal affairs, and cannot grant authority to make testamentary dispositions. A more accurate description of an attorney's scope of authority may be the authority to do anything that the donor could do through an agent.[5]

At common law, a power of attorney terminates upon the donor's incapacity, the very time when it may be the most valuable as a tool for management of the donor's affairs. Section 8(1) of the *Power of Attorney Act*[6] provides for the creation of an enduring power of attorney which continues regardless of a donor's lack of mental capacity, subject to the appointment of a committee under the *Patients Property Act*.[7]

A power of attorney may be either general or limited. An enduring power of attorney is defined as "a power which is executed in accordance with the requirements of the Act for the execution of enduring powers, and which provides that the authority of the attorney continues despite any incapacity of the donor."[8] Both general and limited powers of attorney may be drafted as enduring powers of attorney.

It is the enduring form of power of attorney which may be subject to the most abuse, as the donor is no longer able to oversee the acts of the attorney and may not be able to take steps to revoke the powers bestowed on the attorney.

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4 (2001), 42 E.T.R. (2d) 192 (S.C.) at para. 199, reversed in part (2002), 9 B.C.L.R. (4th) 236 (C.A.).

5 Pawson, Valerie, "*Desharnais v. Toronto Dominion Bank*", [2003] 22 E.T.P.J. 298 at 300.

6 R.S.B.C. 1996 c. 370.

7 R.S.B.C. 1996, c. 349.

8 McLean, A. J., *Review of Representation Agreements and Enduring Powers of Attorney for the Ministry for the Attorney General*, (February 15, 2002) at 48.

II. The 'Good' Attorney: Duties and Responsibilities

A. What Standard of Care Must an Attorney Meet in Carrying Out his/her Duties?

Whether an attorney is entitled to receive compensation for the performance of his duties will affect the standard of care to which he is held.[9] An attorney acting for reward must exercise the care, skill and diligence as is usual in or necessary for the proper conduct of his business.[10] An unpaid attorney must display the same skill, care and diligence he would use in conducting his own affairs.[11] In addition, an attorney, whether paid or unpaid, who undertakes his duties as a professional, must display the requisite professional competence.[12]

B. Does an Attorney have a Fiduciary Duty?

An attorney under power of attorney has a fiduciary duty to act in the best interests of the donor.[13] As a fiduciary, the attorney may not exercise the power of attorney for personal benefit unless the donor consents to the proposed transaction with full knowledge of it or the power of attorney expressly authorizes the attorney to do so.[14]

In *Hodgkinson v. Simms*, La Forest J. for the majority of the Supreme Court of Canada set out the test for establishing the existence of a fiduciary duty. Specifically, it requires that:

(i) the fiduciary has scope for the exercise of some discretion or power;

(ii) the fiduciary can unilaterally exercise that power or discretion so as to affect the legal or practical interests of the beneficiary; and

(iii) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

The Court also observed that relationships characterized by a unilateral discretion, such as the trustee-beneficiary relationship, are a species of a broader family of relationships termed "power-dependency" relationships, a concept which describes any situation where one party, by statute, agreement, a particular course of conduct, or unilateral undertaking, gains a position of overriding power or influence over another party.

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9 Law Reform Commission of British Columbia, *Report on the Law of Agency, Part 2: Powers of Attorney and Mental Incapacity* (Victoria: Queen's Printer, 1975) ("LRC 22") at 30.

10 *Ibid.*

11 *Ibid*.

12 Trevor Aldridge, *Powers of Attorney*, 7th ed. (London: Oyez Longman Publishing Limited, 1988) at 73-4.

13 See e.g., *Anderson v. Anderson Estate* (1990), 71 D.L.R. (4th) 175 (Ont. H.C.J.); *McCardell's Estate v. Cushman* (1989), 104 A.R. 23 (Q.B.) (a person holding power of attorney may not exercise it for own benefit and must always act in interest of grantor). The Court in *Egli (Committee of) v. Egli* (2004), 28 B.C.L.R. (4th) 375 at para. 76, noted than in most cases involving an alleged breach of fiduciary duty by an attorney, the courts have assumed that, where there is a power of attorney, there exists a fiduciary relationship between the attorney and the donor. The Court cited as support for the proposition *McNabb Estate v. Mills*, [1995] B.C.J. No. 893 (S.C.) at 47; *MacGrotty v. Anderson* (1995), 9 E.T.R. (2d) 179 (B.C.S.C.) at 20; and *Chapman (Public Trustee of) v. Watson* (B.C. S.C.), at 23.

14 See Carmen S. Thériault, "Powers of Attorney—Some Fundamental Issues," *supra* note 1 at 238; Carmen S. Thériault, "Power of Attorney Drafting Tips," *Wills, Estates, and Trusts: Selected Topics* (Vancouver: CLE, 2001) at 2; Laurie S. Redden, "Powers of Attorney: What Can They Do and How are They Controlled?," *Estates* (Ontario: CLE, 1994) at 1.

The Supreme Court of Canada in *Gladstone v. Canada (Attorney General)*[15] noted that while discretion, power and vulnerability are common characteristics of a fiduciary relationship, they are not necessarily determinative. At the core of any fiduciary duty is the obligation of one party to act for the benefit of another. The attorney is, by the nature of the instrument, given a discretion or power by the donor, and the ability to exercise that discretion in a manner that can effect the donor's legal or personal interests. Additionally, where there is subsequent mental deterioration of the donor, the donor becomes more and more reliant upon and vulnerable to the actions of the attorney. It is an attorney's duty, absent a specific provision which allows self-dealing, to use the power granted by the donor solely for the benefit of the donor, and not for the attorney's own profit, benefit or advantage.[16] Consequently, the vast majority of attorney/donor relationships would also be fiduciary.[17]

C. Duties of an Attorney

Parties acting under a power of attorney owe a duty to act in the interests of the donor rather than themselves, except to the extent that a conflict of interest has been has been permitted by the donor. Pursuant to that duty, an attorney must apply the appropriate standard of care to investments made and must account for his or her actions.

1. Investment Responsibilities

An attorney is not statutorily restricted to the list of authorized trustee investments provided by s. 15 of the *Trustee Act*[18] but this list provides a useful guideline for attorneys. Given the standard of care owed by the trustee, particularly a paid attorney, investments in assets outside of those identified by the *Trustee Act* as acceptable should be approached cautiously unless expressly authorized by the donor.[19] Investment with high levels of risk may require additional precautions, including the approval of the donor in some cases.

2. What are the Accounting Responsibilities of an Attorney?

His or her status as agent imposes on an attorney a duty to account for any act performed pursuant to the power of attorney.[20] The attorney's obligations commence once the attorney "activates" his power.[21]

At common law, an agent is required to satisfy a number of specific accounting responsibilities. First, an agent must keep all money and property of the donor separate and apart from his own.[22] Second,

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15 2005 SCC 21.

16 *Chapman (Public Trustee of) v. Watson*, [1985] B.C.J. No. 914.

17 See also *Egli*, *supra* and *Bridger*, *infra*.

18 R.S.B.C. 1996, c. 464.

19 *Ibid.*

20 LRC 22 at 30; 2; Linda Fowler, "Powers of Attorney" (Ontario Bar Admission Course Materials, 1993) at 2-4; Mary B. Hamilton, "Power of Attorney & Appointment of Committees" in *Wills, Estates and Trusts: Part 2* (Vancouver: CLE, October 1994) at 1. An agent has a duty to account faithfully, diligently and accurately: *The Earl of Hardwicke v. Vernon* (1808), 14 Ves. Jun. 504 at 510 (Ch.D.).

21 Laurie S. Redden, "Powers of Attorney: What Can They Do and How Are They Controlled?" in *Estates* (Toronto: CLE, January 1994) at 6.

22 *Clarke v. Tipping* (1846), 9 Beav. 284 at 292 (Ch.D.); *Ontario Equitable Life and Accident Insurance Co. v. Baker*, [1926] S.C.R. 297 at 307.

he must maintain accurate and current records of the donor's accounts.[23] Third, he must be ready at all times to produce his account to his principal.[24] And finally, at the end of the agency relationship, he must produce to his principal all books and documents relating to the donor's affairs.[25]

Upon the termination of a power of attorney, a principal or his successor, such as the donor's executor, has a right under the general law of agency to call for an accounting, and to bring a common law action of account.[26]

Apparently, under BC law, an attorney is liable to account *only* to his donor.[27] Thus, where a donor becomes incapable, the attorney is not accountable to anyone during the donor's lifetime.[28]

D. Restrictions on Powers

In addition to any express limitations, all powers of attorney are subject to common law restrictions regarding the extent of the authority that may be delegated by the donor. The inability of an attorney to act in conflict of interest or to "self deal," may be expressly removed by the donor. A power of attorney cannot, however, regardless of its drafting, bequeath authority to make testamentary dispositions on behalf of the donor or delegate the authority to perform any "personal" actions.

Because the donor and attorney relationship is generally accepted as being one which is fiduciary in nature, self-interested actions of an attorney are not permitted, unless they are performed with the knowledge and consent of the donor.[29] However, many donors will grant a power of attorney to their spouses or children, creating a situation in which self-dealing will be difficult to avoid, and may have been intended by the donor. If a power of attorney is not drafted to specifically permit self-dealing, the attorney must then undertake the difficult task of proving that such authority was implicitly granted.

Under s. 27 of the *Property Law Act*,[30] an attorney cannot sell or transfer land owned by the donor to himself or herself. A general power of attorney authorizing the transfer of land does not

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23 *Lord Chedworth v. Edwards* (1802), 8 Ves. Jun. 46 at 49 (Ch.D.); *White v. Lady Lincoln* (1803), 8 Ves. Jun. 363 (Ch.D.); *Pearse v. Green* (1819), 1 Jac. & W. 135 at 140 (Ch.D.); *Clarke v. Tipping*, *supra* at 292; *Gray v. Haig* (1855), 20 Beav. 219 at 238-39 (Ch.D.); *Turner v. Burkinshaw* (1867), L.R. 2 Ch. 488 (L.C.) at 491; *Ontario Equitable Life* at 307.

24 *Pearse v. Green* (1819), 1 Jac. & W. 135 at 140 (Ch.D.); *Turner v. Burkinshaw* , *supra*.

25 *Dadswell v. Jacobs* (1887), 34 Ch. D. 278 at 281 (C.A.); F.M.B. Reynolds, ed., *Bowstead and Reynolds on Agency*, 16th ed. (London: Sweet & Maxwell, 1996) at 6-091.

26 LRC 22 at 32.

27 Hamilton, *supra* at 2.

28 *Ibid*.

29 *Nichol (Re)* (1996), 14 E.T.R. (2d) 176 (Man. Q.B.) at 180; *Egli (Committee of) v. Egli*, *supra* at para. 82; *Tim v. Lai* (1986), 5 B.C.L.R. (2d) 245, [1986] B.C.J. No. 3171 (S.C.); *McCardell's Estate v. Cushman (No. 2)*, [1989] A.J. No. 1394 (Q.B.), 107 A.R. 161, at para. 94; and *Elford v. Elford* (1922), 69 D.L.R. 284 (S.C.R.).

30 R.S.B.C. 1996, c. 377. The section reads, "A sale, transfer or charge to or in favour of himself or herself by an attorney named in a power of attorney, of land owned by the principal and purporting to be made under the power of attorney, is not valid unless the power of attorney expressly authorizes it or the principal ratifies it."

authorize a transfer to the attorney,[31] nor does a general power of attorney authorize an attorney to transfer a gift of cash to himself or herself.[32]

Powers of attorney are traditionally restricted to use in property dealings and not personal care and affairs. An enduring power of attorney does not let an attorney make health care and personal care decisions on the donor's behalf. This is a common misconception and one that gives rise to disputes where attorneys present a copy of the power of attorney to health care providers in an attempt to become the chief decision maker in the absence of a representation agreement prepared pursuant to the *Representation Agreement Act.*[33] Too often, health care practitioners appear loathe to dispute the authority of an attorney to weigh in on heath care issues despite the objections of other family members.

Unless agreed to by the donor, an attorney in BC is not entitled to remuneration for services provided. The agreement may be express or implied. In the absence of an express agreement, the court may look to the surrounding circumstances to determine whether an implicit agreement was made concerning compensation.

III. The 'Bad' Attorney: Claims and Remedies

A. Examples of Mis-Use of Attorney Powers

The majority of cases involving claims brought against attorneys relate to misappropriation of funds or self-dealing on the part of attorneys, most often when the donor is no longer competent and the power of attorney at issue is enduring.

In *Egli v. Egli*,[34] the principal, Hans Egli, was an elderly father of the attorney, David Egli. The principal signed an enduring power of attorney that came into effect when he became mentally incompetent. The attorney transferred property, and two investment accounts, to himself, his wife, and his children, alleging that these transactions were made to further the principal's stated wishes to benefit them.

The court set aside two sets of transactions involving the investment accounts because the court decided that there was no evidence to corroborate the attorney's bare assertion that the principal knew of the transaction and consented to it. Nor was there any evidence of whether the principal had ever evinced the intention to give away the bulk of his investments to the attorney, the attorney's wife, and the attorney's children.

However, the court permitted the attorney to take the principal's residence as a gift. The Court accepted the evidence of the lawyer who drew up the power of attorney that the principal wanted the attorney to own and live in the house, and that the principal understood and approved of the transfer. In other words, prior to incapacity, the principal evinced a clear intention, corroborated by the evidence of the principal's lawyer, that the attorney was to take the house as a gift. The Court ruled that the property transfer, although not specifically authorized in the power of attorney, was not a breach of the attorney's fiduciary duty.

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31 *Tim v. Lai* (1986), 5 B.C.L.R. (2d.) 245 (S.C.); *Gilbert v. Gilbert* (1988), 86 N.B.R. (2d) 260 (Q.B.); see also *Reschentnyk v. Waslyk* (1999), 30 E.T.R. (2d) 278 (Ont. S.C.J.)(the Court held the transfers of land were *prima facie* void because the power of attorney did not expressly authorize a transfer of land to the attorney, however, the Court stated that the defendant attorney was not precluded from leading evidence to justify his actions on the basis that he was trying to protect the plaintiff's interests and ensure that his testamentary wishes were given effect on death).

32 *McNabb Estate v. Mills,* [1995] B.C.J. No. 893.

33 R.S.B.C. 1996 c. 405.

34 *British Columbia (Public Guardian and Trustee of) v. Egli*, *supra.*

This case stands for the principle that the granting of a power of attorney creates a fiduciary relationship between the attorney and the donor, thereby obligating the attorney to use the power only for the benefit of the donor. The attorney can only use the power of attorney for his or her own benefit when acting with the full knowledge and consent of the donor.

The trial judge's decision was upheld by the Court of Appeal.[35] It was held that the trial judge did not err in considering the matter under a fiduciary duty analysis or in concluding that s. 20 of the *Patients Property Act* did not apply to the power of attorney.

In *T.W.D. v. P.W.S.D., E.M.W. and M.E.J.D.*,[36] the plaintiff, in his capacity as co-administrator of his father's estate, brought an action against his brother, who held their father's power of attorney, for the misappropriation of money from the father's account. The defendant used the money for personal financial purposes, and failed to properly fulfill his duties of record-keeping and accounting during the period he acted under power of attorney. The judge found that the defendant was in a position of trust relative to his father and therefore had a duty to account. Masuhara J. also found, on the evidence and the authorities cited, that M.E.J.D. was in a position of trust and had fiduciary obligations to his father. The former attorney was ordered to pay repay his father's estate $243,583 and was ordered to pay additional amounts on the basis of equitable compensation. The Court held that the defendant was required to disgorge all benefits which he received through the use of monies which he was not rightfully entitled to use for his own benefit.[37]

In *Fraser (Guardian ad litem of) v. Fraser*,[38] the plaintiff brought an action against his brother on behalf of their incompetent mother. The defendant had convinced his mother to award him sole power of attorney, and proceeded to use her funds for an ill-fated investment in a company with which he was involved. He did not use the power of attorney to make this investment. His mother became incompetent after the investment was made. Dillon J. held that the defendant had breached his fiduciary duty to the plaintiff, which arose both in the circumstances of the case (acting without instruction or direction to make the investments, usurping his mother's able continuing interest and involvement in her financial affairs, and acting without the basic reasonable care that would be expected in the circumstances) and also from the power of attorney, whether or not it was actually used in the transaction (a proposition for which the judge cited *Lau v. Lee*, [1994] B.C.J. No. 1770 (S.C.), aff'd [1996] B.C.J. No. 1667 (C.A.)). In the result, the attorney was required to return the $40,000 he had invested without his mother's knowledge or consent, plus interest.

In *Shkuratoff v. Carter Estate*,[39] Romilly J. cited *Egli* for the principle that that one who holds a power of attorney for another has a fiduciary duty to the donor which precludes him from using that power for his own benefit, unless the action was done with the knowledge and consent of the donor. In this case, it was found that the deceased donor had intended for the attorney to transfer certain bonds to his own estate and therefore there had been no breach of the duty. There was not, however, sufficient evidence that the donor had had a similar intent with respect to a GIC; therefore, the attorney was held to have the GIC in a constructive trust for the donor's estate.

The case of *McMullen v. McMullen*,[40] is one of the few examples where the donor himself sought to enforce the limits of the power of attorney. The plaintiff's three children held their father's power of attorney. The father began to act strangely, spending money erratically and going into debt. His two

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35 [2005] B.C.J. No. 2741 (C.A).

36 *T.W.D. v. P.W.S.D., E.M.W. and M.E.J.D.*, 2004 BCSC 497 (CanLII).

37 *Ibid.*, paras 15-16.

38 *Fraser (Guardian ad litem of) v. Fraser*, [2000] B.C.J. No. 244, paras. 25-26.

39 *Shkuratoff v. Carter Estate*, [2007] B.C.J. No. 1584, paras. 28-33.

40 *McMullen v. McMullen*, [2006] B.C.J. No. 2900.

daughters transferred a 99% interest in his condominium to their husbands in an attempt to preserve his only remaining asset, while seeking to have their father declared financially incompetent. His doctor refused to make this declaration, and it was held that the transfer was void since the daughters had acted beyond the scope of the power of attorney in acting contrary to their father's intentions, and were unable to prove that their father was incapable of managing financial affairs at the time of the transfer.

In *Bridger v. Bridger*,[41] the deceased donor had granted a power of attorney to his second wife, which she used after his incompetence to sell two of the couple's rental properties, banking the proceeds, and giving gifts to the children of her first marriage totalling $130,000. The action was initiated by the attorney, who sought a share of the husband's estate. The donor's daughters counterclaimed against Bridger for an accounting of dissipation of cash. Rogers J. found that the husband's dementia was so severe when he signed the power of attorney that he did not have the mental capacity to give it, but that in any case the attorney owed her husband a fiduciary duty with respect to her dealings in his affairs. Half of the proceeds of the sale of the two properties were therefore impressed by a trust in the husband's favour. Rogers J. relied on *Egli* at para. 44 of his decision, again for the attorney's duty to use the power only for the benefit of the donor and not for the attorney's own profit, benefit or advantage.

B. Remedies to Stop the Rogue Attorney

Many family members who have suspicions or concerns about the actions of an attorney in respect of an incapacitated person have a limited appreciation of the options available to confirm their suspicions of misconduct, reverse transfers made by an attorney, or remove the attorney before irreparable harm is done to the donor's assets and estate.

1. Can Third Parties Demand an Accounting?

As stated above, an attorney has a duty to account to his principal, and the successor representatives of the principal, such as the executor. Failure to provide such an accounting can lead to the commencement of proceedings to pass the accounts, as seen in the case of *T.W.D. v. P.W.S.D., E.M.W. and M.E.J.D*, above. But what of the right of concerned family members to audit the actions of an attorney while the donor is incapacitated but still alive? In BC, unless there is a co-attorney who is entitled to an accounting from the other, it does not appear likely that a court can compel an attorney to account to family members or prospective beneficiaries of the donor's estate.

The situation is different in Ontario. Ontario has a similar *Powers of Attorney Act*, but s. 9 (and much of its other content) was repealed in favour of the *Substitute Decisions Act* ("*SDA*"),[42] which was introduced in 1995. The *SDA* is a comprehensive statute which governs all aspects of powers of attorney for property and personal care decision-making. Section 39(1) of the current *SDA* allows for the court to give directions on any question arising in connection with the power of attorney, and subsection 2 allows for application for such direction to be made by the incapable person's guardian of property, attorney under a continuing power of attorney, dependant, guardian of the person or attorney under a power of attorney for personal care, by the Public Guardian and Trustee, or by "any other person" with leave of the court.

In the recent case of *McAllister Estate v. Hudgin*, [2008] O.J. No. 3282 (S.C.J.), a plaintiff beneficiary of his mother's estate applied for an accounting of the activities of his mother's attorney, who became the executor on their mother's death. The defendant former-attorney, now executor, argued that the

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41 *Bridger v. Bridger*, [2005] B.C.J. No. 398.

42 *Substitute Decisions Act*, 1992, S.O. 1992, c. 30.

plaintiff was only a beneficiary and had no standing to request the accounts, nor did the former attorney have a duty to account to her. Relying on Ontario's *SDA*, the Court confirmed that the plaintiff, as beneficiary, was qualified as "any other person" under s. 42(4) to require the passing of accounts. The former attorney was required to provide copies of their mother's financial records relating to the attorney's assistance with her mother's financial affairs. The plaintiff's related application to remove the executor was dismissed.

David Simmonds, in his article "Planning For Incapacity"[43] sheds some light on why the concept of a duty to account is more developed in Ontario. It describes the former provisions of the province's *Powers of Attorney Act*:[44]

> The Act recognizes the common law principle that accounting as between a principal and an agent is a private matter. A third party only has standing to call the attorney into account when the donor is without legal capacity (s. 9(1)). In addition, while any person having an interest in the estate of the donor, or any other person permitted by the Court, including the Public Trustee, may apply to the Court for an order requiring the attorney to pass his or her accounts, the accounting may only take place in respect of an exercise of the power during the incapacity of the donor. Therefore, if the affairs of a trusting but capacitated principal have been mismanaged, the Act does not render much assistance. Moreover, since the Court has a discretion whether or not to order an accounting, third parties who have only a suspicion of mismanagement may have insufficient justification to require a Court to act.

In BC, without express authorization to review the financial records of an incapacitated donor, it is difficult for concerned family members to substantiate or dismiss suspicions concerning the activities of an attorney while the donor is still alive.

2. Revocation or Termination of the Power of Attorney

A mentally competent donor may revoke a power of attorney at any time. A power of attorney may also be revoked by the subsequent granting of a second power of attorney that is inconsistent with the first or by the physical destruction of a power of attorney, if the destruction is coupled with an intent to revoke.[45]

However, in cases were capacity is in doubt, it is not advisable to recommend that family members undertake to assist a donor with revoking a power of attorney, or appointing an alternate attorney, unless the donor's capacity to do so is confirmed by medical or legal practitioners. The affected attorney may challenge the validity of the revocation or, worse, may raise allegations of undue influence against family members who attempt to facilitate the revocation of an enduring power of attorney despite the best intentions of the family members.

3. Intervention by the Public Guardian and Trustee

The Public Guardian and Trustee's mandate is to protect the interests of incapable adults. When the Public Guardian and Trustee receives a referral, the Public Guardian and Trustee may investigate under the authority of the *Public Guardian and Trustee Act,* the *Representation Agreement Act* and/or the *Patients Property Act*. The object of the investigation is to determine whether a Committeeship is

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43 David Simmonds, "Planning For Incapacity," (1988) 27 E.T.R. 117.

44 Simmonds is referring to R.S.O. 1980, c. 386; now R.S.O. 1990, c. P.20.

45 *Gold v. Toronto Dominion Bank* (2001), 197 D.L.R. (4th) 488, leave to appeal refused, [2001] S.C.C.A. No 254.

required, or whether less intrusive arrangements can be put into place to assist the adult.[46] A referral can come from the Public Guardian and Trustee or from a "Designated Agency" as defined by the *Adult Guardianship Act*[47] such as health authorities, hospitals and community agencies.

The Public Guardian and Trustee has authority to investigate allegations of financial abuse. The *Public Guardian and Trustee Act*[48] confirms the investigation and audit powers include investigations of attorneys:

> **Power to investigate and audit**
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> 17(1) The Public Guardian and Trustee may investigate and audit the affairs, dealings and accounts of
>
> (a) a trust, a beneficiary of which is or may be a young person, an adult who has a decision maker or guardian, or an adult who does not have a decision maker or guardian but who is apparently abused or neglected, as defined in the Adult Guardianship Act.
>
> (b) *an attorney under a power of attorney if the Public Guardian and Trustee has reason to believe that the person who granted the power of attorney is incapable of managing his or her financial affairs, businesses or assets*,
>
> (c) a representative under a representation agreement, or
>
> (d) a decision maker or guardian
>
> *if the Public Guardian and Trustee has reason to believe that the* interest in the trust, or the assets of the young person or adult, may be at risk, or that the *attorney, representative, decision maker or guardian has failed to comply with his or her duties*. [emphasis added]

Under certain circumstances, the Public Guardian may take immediate steps to freeze assets:

> 19(1) In this section, "adult" means an adult who is apparently abused or neglected, as defined in the *Adult Guardianship Act*.
>
> (2) If the Public Guardian and Trustee has reason to believe that the financial affairs, business or assets of a young person or an adult are in need of immediate protection, the Public Guardian and Trustee may do one or more of the following:
>
> (a) instruct any institution where the young person or the adult has an account that no funds are to be withdrawn from or paid out of that account until further notice;
>
> (b) direct any source of income for the young person or the adult to send the income to the Public Guardian and Trustee to be held in trust for the young person or adult;
>
> (c) halt any disposition of real or personal property belonging to the young person or adult;
>
> (d) take any other step that is necessary to protect the financial affairs, business or assets of the young person or adult and that is reasonable in the circumstances.
>
> (3) A step taken under subsection (2) remains in effect for 7 days or a shorter period set by the Public Guardian and Trustee.

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46 See "Financial Inquiries by a Designated Agency and Investigations by the Public Guardian and Trustee," October 2004 at: http://www.bccrns.ca/resources/bcceas_conference2004/Financial%20Inquiries%20by%20DA%20and%20PGTRevised%20October%202004%20-%20FINAL.doc

47 R.S.B.C. 1996 c. 6.

48 R.S.B.C. 1996 c. 383.

4. Recourse Through the Patients Property Act

The broad judicial discretion allowed by the *Patients Property Act*[49] may be of use in exerting some control over the misuse of powers of attorney. Section 2(1) of the *Patient's Property Act* ("*PPA*") allows for the Attorney General, a near relative of a person, or any other person to apply to the court for an order declaring that a person is incapable of managing her or her affairs. An order made pursuant to s. 3 of the *Patients Property Act* that the donor is incapable of managing either himself or herself or his or her affairs, or the appointment of a committee pursuant to s. 6(1) of the Act, has the effect of revoking all powers of attorney granted by the donor, as per s. 19 of the Act. Section 8(2) of the *Power of Attorney Act*[50] also confirms the revocation of all existing powers of attorney on the issuance of a Committeeship Order:

> 8(2) The authority of an attorney given by a power of attorney referred to in subsection (1) terminates
>
> (a) on the making of an order under section 3 of the *Patients Property Act*,
>
> (b) on the appointment of a committee under section 6 (1) of that Act, or
>
> (c) as provided in section 19(a) or 19.1(3)(a) of that Act.

A Committee appointed by the court assumes control over either the financial affairs (Committee of estate) or personal affairs (Committee of person) of an incapacitated adult, or both, provided the court is satisfied that the person is incapable by reason of mental or other infirmity from managing his or her financial or health care decisions. An Order for Committeeship of person is particularly useful to prevent attorneys who either mistakenly or deliberately attempt to exercise the power of attorney to make health care decisions for an infirm adult.

Once committeeship proceedings are triggered, the court will be able to order an accounting where it appears that an existing power of attorney is being misused.

In *Re Vranic*,[51] the Chambers judge ordered an accounting from the daughter of an incapacitated person, who had been appointed power of attorney at a point when the donor may not have had the requisite capacity to grant one. Her siblings applied to be appointed the donor's committee of the person after he became incapacitated, while their sister, who held the power of attorney, opposed this application and cross-applied to be appointed as committee. The chambers judge did not specifically state his authority for ordering the accounting in this action, but presumably relied upon s. 28 of the *Patients Property Act*, which states:

> If there is insufficient provision in this Act, the court may at any time, on the application of any person, make an order not in contradiction to this Act or the regulations that it considers necessary for or in the interests of the proper, honest and prudent management and administration of the estate of a patient.

5. Claims by Committees or Estate Representatives

Once a person other than a 'rogue' attorney is granted an Order for Committeeship of a person's estate, that Committee has full authority to step into the shoes of the donor and commence whatever investigations or proceedings are necessary to recover assets or property or to attempt to reverse transfers which were made when the donor was incapable or to which they did not consent.

Section 20 of the *Patients Property Act* raises a rebuttable presumption that a person who is or becomes incapable of managing their affairs was incapable of making a valid gift or conveyance or

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49 R.S.B.C. 1996, c. 349.

50 R.S.B.C. 1996, c. 370.

51 *Vranic (Re)*, [2007] B.C.J. No. 2908.

transfer to a third person. This is a particularly useful tool in situations where a rogue attorney claims that any self-dealing or misappropriation of funds was done with the express consent of the donor. Section 20 provides:

> **Conveyances**
>
> 20 Every gift, grant, alienation, conveyance or transfer of property made by a person who is *or becomes* a patient is deemed to be fraudulent and void as against the committee if
>
> (a) the gift, grant, alienation, conveyance or transfer is not made for full and valuable consideration actually paid or sufficiently secured to the person, or
>
> (b) the donee, grantee, transferee or person to whom the property was alienated or conveyed had notice at the time of the gift, grant, alienation, conveyance or transfer of the mental condition of the person. [emphasis added]

Following the death of a donor or patient, any power of attorney or committeeship order is extinguished in favour of the estate representative. If the executor appointed by a will also happens to have been the attorney now suspected of wrongdoing, beneficiaries may argue that a conflict of interest has arisen and that a new executor must be appointed. If there is potential for litigation between the executor and the estate due to the executor's past acts as attorney, the executor's authority, at a minimum, should be suspended until the disputed issues are resolved.

In *Cooke v. Miller Estate,*[52] the Court of Appeal allowed a party other than the executor to bring an action to recover assets for the estate in a situation where the executrix received substantial gifts outside the will and the shares of her siblings, as beneficiaries of the estate, were reduced. However, in a similar situation, the court declined to give standing to a beneficiary of an estate relating to allegations of abuse of a power of attorney in the deceased's lifetime.[53] In such instances where only an estate can bring an action on behalf of the deceased but the executor is unwilling to take action, applications to remove an executor or appoint an administrator *pendente lite* are likely.

IV. Conclusion

The granting of a power of attorney must be carefully considered. Solicitors seeking to provide their clients with the tools and information necessary to decide upon a suitable attorney and prevent disputes amongst their family members should consider Justice Cullity's remarks in *Stern v. Stern*[54] on the current realities of estate litigation prior to the death of an incapable person:

> The court should not, I think, close its eyes to the fact that litigation among expectant heirs is no longer deferred as a matter of course until the death of an incapable person. While, in law, the beneficiaries under a will, or an intestacy, of an elderly incapable person obtain no interest in that person's property until his, or her, death, the reality is that very often their expectant interests can only be defeated by the disappearance, or dissipation, of such property before the death.

Before problems arise, donors should be informed about the significant powers they bestow on an attorney, particularly when the powers endure following the incapacity of the donor. Equally important is ensuring that the prospective attorney is educated by the donor or his or her legal counsel about their duties, responsibilities and the restrictions on authority associated with a power of

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52 2005 BCCA 263.

53 *Lloyd v. Bloomingdale Estate*, 2005 BCSC 1806 (Master).

54 2003 CanLII 6193 (Ont. Sup. Ct.)

attorney. A donor and his legal counsel should also ensure that the power of attorney instrument contains clear, concise wording delineating the extent of the attorney's powers and rights of compensation in order to prevent conflicting interpretations of those powers by the attorney and the donor's family.

The donor may decide to appoint two attorneys so that there is greater transparency with each transaction entered into on behalf of the donor, and that each attorney will be accountable to the other for their actions. Or, the donor may decide to appoint someone other than the attorney to serve as executor so that the attorney will be accountable to a third party for his or her actions following the death of the donor.

A great deal of litigation, particularly amongst siblings, could be avoided if attorneys are properly advised as to their very strict fiduciary duties, obligations and limitations. When the damage has been done, counsel should look to protect the interest of donors and their beneficiaries through the remedies found in guardianship legislation, substitute decision-making and succession legislation.