

Wills, Trusts & Estates

Preventing POA misuse: The importance of law reform in Ontario

By **Emma Hamilton**



Emma Hamilton

(May 16, 2018, 8:48 AM EDT) -- In recent years, the importance of having a power of attorney for property in place for estate planning purposes has been emphasized given our aging population, and there has been corresponding growing litigation in the area. Serious concerns have been raised on the accountability of an appointed attorney and the lack of education provided to an attorney before stepping into such role.

The purpose of a power of attorney for property is to give one or more persons (the "attorney") the power and authority to make financial decisions on behalf of the person executing the document (the "grantor"). Decisions can be made by the attorney when the grantor is no longer capable of doing so, although the power of attorney can be used while the grantor is capable as well if it does not provide to the contrary.

Attorneys when acting in their role have significant responsibilities under the *Substitute Decisions Act*, the governing legislation in Ontario for powers of attorney. These include maintaining proper records of their management of the grantor's affairs and looking after the grantor financially. Attorneys also have fiduciary duties under the law, including to act with honesty, integrity and in good faith as well as to always put the best interests of the grantor first. The fiduciary duties of an attorney to the grantor have been discussed in various cases including *Hanson Estate (Re)*, 2016 ONSC 2382 and *R v. Hooyer*, 2016 ONCA 44.

Breaches of duties can come in various forms. Some arise from a lack of understanding of the legal responsibilities, such as failure to keep proper accounts or co-mingling assets with the grantor. Some unfortunately arise from an intentional misuse of the attorney's powers. Common areas of misuse include using the power of attorney without the grantor's knowledge and theft or misappropriation of the grantor's assets, including fraudulent conveyance of title into the attorney's name (as seen in *Tarantino v. Galvano*, 2017 ONSC 3535). Abuse of powers of attorney can be seen in the form of physical and psychological abuse that can continue for several years without anyone knowing, leaving the grantor extremely vulnerable. These abuses overlap with growing concerns in society regarding elder abuse and identity theft.

Parties who suspect such abuse by an attorney can take steps to commence litigation or file a court application. As well, criminal charges may also be pursued under the *Criminal Code*, including theft, misappropriation of funds, forgery, breach of trust, and, in particular, the specific crime of theft by person holding power of attorney. Although there are several avenues to address misuse and abuse by an attorney, litigation can be lengthy and costly for the parties involved, including the grantor, and requires significant proof of the alleged abuses, particularly when holding an attorney criminally liable.

Law reform for powers of attorney has been discussed in various contexts, but one of the main concerns is the lack of checks and balances in the system. The issue of overhauling the law regarding powers of attorney has been extensively reviewed by the Law Commission of Ontario (the "Commission") who conducted nearly two years of research and released a report in March 2017, *Legal Capacity, Decision-making and Guardianship*.

After a review of the current system, the Commission made various recommendations, including to create a specialized tribunal to deal with attorneys and guardians, require annual reporting by attorneys, create a power to appoint a monitor for an acting attorney, provide education for attorneys, and require a statement of commitment by attorneys when appointed.

Ensuring accountability of attorneys for their actions and catching any misuse of powers of attorney early on can prevent disastrous consequences in the future, as seen in various recent cases. As well, and as noted by the Commission, education is key in helping attorneys understand their responsibilities and duties and could be achieved through a government program or courses at educational institutions.

In order to ensure vulnerable parties are protected, steps should be taken to improve the current system. What remains to be seen is whether Ontario will adopt an educational process and improved system of accountability to prevent misuses and abuses by rogue or uninformed attorneys. Although we have a long road ahead, educating the public and law reform proposals are important first steps in addressing an increasingly problematic area of the legal system.

Emma Hamilton is an associate at O'Sullivan Estate Lawyers.

Photo credit / Daisy-Daisy ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437- 828-6772.

© 2018, The Lawyer's Daily. All rights reserved.