



**ABUSE OF EPAS:
LAW REFORM COMMISSION OF NS**



LAW REFORM PROJECT

ACCESS TO JUSTICE
& LAW REFORM
INSTITUTE
OF
NOVA SCOTIA



- Now called Access to Justice & Law Reform Institute of NS
- In 2010 the Law Reform Commission received a reference from Government to review the *Powers of Attorney Act* which was introduced in 1988
- The Law Reform Commission compiled an Issues Paper, an advisory group of high level stakeholders and consulted on proposals for reform
- In 2015, the Law Reform Commission issued a 275 page report setting out 178 recommendations for reforming the power of attorney regime in Nova Scotia
- A central focus in reform was addressing financial abuse using enduring powers of attorney

ENDURING POWERS OF ATTORNEY

- A power of attorney appoints a person (the attorney) to help the maker of the power of attorney (the donor) manage property and finances.
- The attorney can make decisions, and enter into legal transactions on behalf of the donor.
- An enduring Power of Attorney “endures” into the time when the person who granted the power of attorney loses “capacity”
- The wide range of authority in a typical EPA, and the vulnerability of many donors, creates a situation which is ripe for abuse. Some have even labeled EPAs a “license to steal.”

ABUSE OF POWERS OF ATTORNEY

- Child takes parent to lawyer to draw up (or revoke previous) enduring power of attorney in their name
- There are no limitations on the authority of the attorney so he or she has full authority to deal with their parent's bank account
- Child then takes the enduring power of attorney to the bank and asks for a bank card or to become a joint account holder with full access
- Bank hands over bank card without asking to speak with the parent or gain instructions from the parent on what limitations should be placed on the use of the account by the child (ie., issuing bank card will give full access)
- Child now has full access to parent's bank account without supervision

SCOPE OF THE PROBLEM

- As of 2015 no comprehensive study on financial abuse using EPAs has been undertaken in Nova Scotia
- A national survey of elder abuse in Canada found that 40 persons per 1000 of Canada's elderly population (65 years of age or older) had experienced some form of abuse.
- The most prominent form of abuse of the elderly was financial exploitation or material abuse, with 2.5% of the sample having experienced some form of financial abuse.
- Two comprehensive studies of financial abuse of seniors – one conducted in Manitoba and one in British Columbia – found that the problem of financial abuse could be more prevalent than the findings from the national study revealed.

SCOPE OF THE PROBLEM

- May be under reported because it occurs in families and elders may be experiencing cognitive decline
- Manitoba study found that of 354 cases opened on incapacitated adults 60 years of age or older, in 21.5% of those cases there was some suspicion of financial abuse. The most common suspect in cases of financial abuse was the adult child of the incapacitated adult.
- One study of financial abuse of seniors conducted in British Columbia from 1992-1995 found that 8% of older adults acknowledged that they had experienced financial abuse. The British Columbia study revealed that while many donors who had granted powers of attorney did not experience financial abuse, financial abuse involving a power of attorney was the second most common form.

CURRENT LANDSCAPE FOR ADDRESSING ABUSE: POLICE

- Theft using a power of attorney is a crime under the Criminal Code of Canada
- The benefit of using this provision is that it sends a strong message to the public that abuse using EPAs is not acceptable
- It also helps to alleviate the harm to the elder person and may see the offender pay back the money to the victim (restitution)
- As well, this process will be free and totally undertaken by the police which is important for a potentially older, financially insecure or vulnerable senior

LIMITATION OF POLICE RESPONSE

- We have heard that often times police have trouble pursuing these cases
- Often they consider this to be a “family matter”
- As well, they are concerned with the ability of the donor to give evidence if there is incapacity
- Furthermore, the EPA is a broad instrument and it may be hard for police to sort out whether a crime has been committed or not
- Finally, many elder persons may not want to report family to the police especially if they rely on them for care

SENIOR SAFETY COORDINATORS

- Fantastic resource for elder persons
- Located in police detachments across Nova Scotia to assist seniors navigate fraud and other criminal matters
- Perform an important education and advocacy role

Limitations:

- They currently do not have the power to carry out investigations themselves
- They have no enforcement power other than advocating with third parties, family on behalf of seniors or referring matters to police

APPLICATIONS FOR ACCOUNTING

- Where there has been theft using a power of attorney, the most common response is to go to court to get the attorney to account
- The party bringing the case may ask to terminate the attorney's authority and substitute another attorney and such other relief as the judge considers appropriate
- This means that the attorney must show the court all the financial documents and how they have been administering the estate of the elder person
- Where theft is found the court can order return of money
- The court can appoint a new attorney

LIMITATIONS OF GOING TO COURT

- Can be expensive and time consuming
- Difficult for a low income or vulnerable elder person to navigate this process on their own
- At present the court may order an accounting only for the period of the donor's incapacity
- This means that if the theft happened while the donor had capacity, this may not be revealed in the court case
- Because the court does not want to interfere with the donor's autonomy they may not make an order simply because it is in the donor's best interests

PUBLIC TRUSTEE

- Public trustee can only go to court to ask for an accounting just like any other citizen
- She does not have independent enforcement powers
- Currently underfunded and not able to take on the large caseloads that would come with bringing accountings to court other than for their already pre-existing clients

ADULT PROTECTION

- Adult Protection does not have the authority to address situations involving financial abuse
- The expertise of adult protection does not seem to be in the types of forensic accountings that may be needed in order to find and address financial abuse
- As such, Adult Protection Services may not be the right body to rely on to carry this out unless the elder person is also suffering physical harm or neglect

OUR RECOMMENDATIONS

- The Act is now over 30 years old and is out of date
- There are only seven sections of the Act and they do not do much to address abuse of powers of attorney
- We have made a number of recommendations to help ensure that enduring powers of attorney can be granted effectively and safely
- For example, we have recommended that the Act confirm that an enduring power of attorney can spring into action only upon the donor's incapacity – so when the donor is capable they still make the decisions themselves
- Person convicted of fraud cannot act as attorney
- Use of a standard form EPA in the Regulations that adheres to the “best practices” we recommend in the Report

GREATER EDUCATION

- The Government of Nova Scotia, in collaboration with relevant stakeholder organizations and professional bodies, including volunteer legal resources, should develop and disseminate an accessible, plain-language standard form EPA, with explanatory notes and accompanying educational materials.
- A standard form EPA, along with notes and education materials, should be made widely available both online and in hard copy,
- Advise of option to make a general EPA or to itemize specific powers (e.g., investments, borrowing, sale or encumbrance of real property, etc.) from a checklist;
- Notes and education materials should caution the donor as to the risks of a general gifting clause. The standard form EPA should not include such a clause in its optional list of specifically authorized powers.
- The Nova Scotia Barristers' Society should ensure that its members who deal with donors and attorneys are aware of the CBA's Best Practices in Giving Legal Advice to Clients re Powers of Attorney and other relevant professional literature, and the relevant provisions of the Code of Professional Conduct.

MONITORS & NOTICE OF ATTORNEY ACTING

- In order to ensure that family and friends are able to assist the elder person as much as possible to watch for and address abuse, we recommend that persons not only nominate an attorney but a “monitor”
- The Monitor may request financial information from the attorney from time to time to assess how the attorney is spending the elder person’s money
- We also recommend that when the attorney begins to act under the enduring the power of attorney, the attorney send to the monitor a “notice of attorney acting” so the monitor knows the attorney has begun to act
- Where there is no monitor, the attorney sends the notice to the immediate family of the elder person
- Attorneys should be advised in Act and education materials of all the financial information they should keep and the duty to account

APPLICATIONS TO COURT

- As discussed, applications to court for an accounting, for return of monies and for removing the attorney, remain the primary basis on which people see redress for abuse
- We recommend extending the jurisdiction of the court to allow court to review accounts for when the donor had capacity
- Add care homes as an interested party able to bring an application where they wish to
- Have matters heard at Probate Court where there is greater experience with accountings
- Provide greater legal aid for seniors and persons with disabilities to access counsel to address EPA abuse

PUBLIC AUTHORITY

- The Government of Nova Scotia should promote awareness, training and capacity building among law enforcement agencies, to ensure effective criminal response to EPA abuse.
- As discussed there are a number of limitations to contacting police, going to court and simply drawing up a more limited EPA.
- Instead, we recommended that the development of a public authority that should have powers of investigation and enforcement
- This could be a brand new office of Public Guardian and Trustee
- Or it could involve bolstering the capacity and powers of the Public Trustee

A PUBLIC AUTHORITY

- Power of the public authority should be based on the principle of respect for the autonomy of the elder person, the fluctuating nature of capacity, and acting not only in the best interests of the elder person, but according to the wishes of the elder person where reasonable
- They could take over the education component of ensuring the safe and effective use of EPAs, including education for banks on how to spot and address abuse
- Public authority should have the power to put together a support and assistance plan for an elder person where they wish assistance in addressing their needs, including abuse

INVESTIGATIVE AUTHORITY

- a) no mandatory duty to report suspected abuse;
- b) protection for persons who do report abuse in good faith;
- c) authority to require production of any record or information necessary to the investigation;
- d) ability to obtain a warrant to enter premises, and seize and take possession of any information that is being refused;
- e) authority to require details of financial transactions from attorneys;
- f) provision for a forensic audit.

ENFORCEMENT AND REMEDIES

- a) provision of legal counsel and financial management services to the adult;
- b) authority to direct financial institutions to suspend the withdrawal or payment of funds from a person's account for up to thirty days if there are reasonable grounds to believe that a vulnerable adult is the victim of financial abuse;
- c) authority to halt the disposition of any real or personal property, including withdrawal of funds, to divert income to the authorized protective agency, and to take any other reasonable steps necessary, for up to thirty days, where the agency suspects that an adult's affairs are in need of immediate protection;

ENFORCEMENT AND REMEDIES

d) authority for financial institutions to suspend a transaction for up to 5 days with notice to the enforcement agency, discretion to permit payments;

e) ability to obtain an order varying or terminating an EPA;

f) authorization to report the conclusions of any investigation to police;

g) ability to seek appointment as the attorney or guardian of the incapacitated donor;

h) ability to seek an order for restitution of monies or property misappropriated by attorneys, as well as other remedies provided under the Powers of Attorney Act

SUMMARY OF RECOMMENDATIONS

1. Implement recommendations to update the *Powers of Attorney Act*
2. Greater education for persons wishing to grant an enduring power of attorney
3. Greater education for attorneys so they don't innocently misuse parent's funds
4. Involve family and friends more in supervising how the enduring power of attorney is being used
5. Recommend use of monitors and notice of attorney acting

SUMMARY OF RECOMMENDATIONS

6. Improve court process so that court is not limited to demanding an accounting only for the period where the elder person was incapacitated
7. Greater education for police on how to address abuse of enduring powers of attorney in families
8. Implement recommendations to improve investigation and enforcement of abuse of enduring powers of attorney by creating a public guardian and trustee
9. Greater education for lawyers and banks in spotting and addressing abuse of powers of attorney by making greater inquiries into use of the enduring power of attorney

CONTACT INFO

Powers of Attorney Act Final Report: www.lawreform.ns.ca

Ilana Luther: ilana@lawreform.ns.ca

(902) 802-9825

ACCESS TO JUSTICE
& LAW REFORM
INSTITUTE
OF
NOVA SCOTIA

