



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





# LAW REFORM PROJECT

- ▶ 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 worked closely with Senior Safety Coordinators and in Particular Sharon Elliott, Dawn Thomas, Jocelyn Yerxa and Michelle Parker
- ▶ 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.

# LIMITATION OF POLICE RESPONSE

- ▶ Theft using Power of Attorney is a crime
- ▶ 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

# LIMITATIONS OF GOING TO COURT

- ▶ 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
- ▶ Can be expensive, complicated and time consuming
- ▶ Previously, the court could only 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

# 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
- ▶ Great education and empowerment for donors
- ▶ Involve family and friends more in supervising how the enduring power of attorney is being used
- ▶ Recommend use of monitors and notice of attorney acting
- ▶ Improve court process so that court is not limited to demanding an accounting only for the period where the elder person was incapacitated
- ▶ Greater education for attorneys so they don't innocently misuse parent's funds

# Donor Education and Empowerment

- Raise awareness donors can ask for accounting from attorney
- Raise awareness in Act that Donors can revoke and change their powers of attorney where they have “capacity”
- Ensure Act contains a notion of capacity that recognizes that “capacity” is not an “all or nothing” state

A person is not incapable of making decisions regarding property and financial affairs by reason only that the person requires support or assistance to understand information relevant to the decision or appreciate the reasonably foreseeable consequences.

- Make sure when attorney acts, they follow the directions of the donor unless these cannot be determined or are “unreasonable”

# Attorney Decision-Making

Attorney Decision-Making when Donor Lacks Capacity:

- the attorney **shall consult with the donor**, if it is reasonable to do so, and
- make the decision in accordance with any **relevant instructions (most recent)** given by the donor when the donor had capacity;
- in the absence of any instructions given when the donor had capacity, make the **decision in accordance with the current wishes of the donor**, if the wishes are reasonable;
- where the wishes of the donor **cannot be determined or are unreasonable**, make the decision that the attorney believes the **donor would make**;
- Where attorney does not know what the donor would do then **act in Best Interests**;

# Addressing Financial Abuse

- An attorney shall not dispose of assets the attorney knows are subject to the donor's estate plan, unless the disposition is necessary to comply with the attorney's duties.
- Attorney may not be: person convicted of an offence involving dishonesty (unless donor allows in writing), undischarged bankrupt, provides healthcare or support services for compensation unless family member
- Specific power of attorney: A donor may give an attorney “specific authority respecting certain property or financial matters”
- “Springing” Power of Attorney: A power of attorney may provide that the attorney may exercise the attorney's authority only when “it has been determined that the donor lacks capacity to make decisions with respect to the donor's property and financial affairs;”
- Even if donor allows, attorney cannot make gift if it would compromise needs of donor

# Increasing Accountability: Donor, Monitor, Family

- An attorney is bound by a duty not to unreasonably interfere with or prevent personal contact between the donor and supportive friends and family of the donor.
- POA witnessed and signed by two people of the age of majority, who are both present at the time the donor signs the document and who are not the attorney or the spouse, registered domestic partner, common-law partner or a child of the attorney.
- “Notice of Attorney Acting”
- Monitor

# Monitor

- A donor may appoint a monitor in a power of attorney.
- Even if the donor does not appoint a monitor the attorney must account to immediate family members when asked (max once a year)
- A monitor may
  - visit and communicate with the donor at any reasonable time;
  - request records from the attorney kept under Section 12;
  - demand an accounting from the attorney in accordance with subsection 13(3); and
  - apply for a Court order under subsection 18(1).

# 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

# Duty to Keep Records

- a current list of all assets and liabilities under the attorney's control,
- all records of any transaction undertaken under the appointment as attorney, including but not limited to receipts, cancelled cheques, invoices, bank statements, copies of title, conveyances and any relevant correspondence
- a closing summary of the estate's current assets and liabilities under the attorney's control, with values if they are known or can be reasonably estimated by the attorney.
- A donor may require an attorney to account to the donor on demand for all transactions undertaken on the donor's behalf.

# Duty to Account

13 (1) For the purpose of this Section, an accounting includes

(a) a statement of the assets and liabilities of the donor under the attorney's control at the beginning of the accounting period, with values if they are known or can be reasonably estimated by the attorney;

(b) details of any transactions involving the donor's estate, including copies of any records of those transactions, as well as bank account statements and any other statement of the value of an asset or liability that the attorney may have received; and

(c) a closing summary of the estate's current assets and liabilities under the attorney's control, with values if they are known or can be reasonably estimated by the attorney.

# Court

On application by an attorney, a monitor, the Public Trustee or an interested person, the Court may make any order it considers appropriate, including an order:

- Providing directions
- declaring that a power of attorney is valid
- authorizing an attorney to make, change or revoke a beneficiary designation;
- requiring an attorney to provide records referred to in Section 12 to the Court or to another person;
- requiring the release of information or records;
- requiring an attorney to attend to show cause for the attorney's failure to do anything that the attorney is required to do as attorney or by an order made under this Act;
- allowing or disallowing all or any part of the remuneration claimed by an attorney;
- terminating the authority of an attorney or terminating a power of attorney;

# “Interested Persons”

- (i) the donor's spouse, registered domestic partner or common-law partner,
- (ii) an adult child of the donor,
- (iii) an adult grandchild of the donor,
- (iv) an adult great-grandchild of the donor,
- (v) a parent of the donor,
- (vi) an adult sibling of the donor,
- (vii) an adult niece or nephew of the donor,
- (viii) the Public Trustee,
- (ix) an attorney or a monitor or any other person listed in the power of attorney,
- (x) the donor's delegate in the donor's personal directive or equivalent document,
- (xi) a representative of a care home where the donor is residing, and
- (xii) following the donor's death, a personal representative of the donor's estate

# What Still Has not Been Implemented

- Have heard there will be a phase 2
- Need to Address Domestic Violence ie., prohibit abusing attorneys
- Greater Attention to persons who do not meet the standard of “capacity” ie., Disability Rights Movement, e.g. Representation Agreement in BC
- Greater Education:
  - Greater education for police on how to address abuse of enduring powers of attorney in families
  - 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
  - Standard Form EPA
- Public Authority with Investigative and Enforcement Powers

# 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