

Friendly Fraud

Financial Abuse of the Vulnerable

Presented to Association of Certified Fraud Examiners

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Notice

The intent of this presentation is to provide general information on the topic. Examples have been provided to illustrate some of the issues that may arise. Information provided by the presenter should be considered as being general in nature and not advice on a particular situation. Specific situations can only be addressed after a complete review of all the facts.

Friendly Fraud

- Misappropriation or misuse of victim's assets by someone in a position of trust
- This could include family members, friends and service providers
- Victims are unable to understand the situation due to age or medical condition

Fiduciary

- A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.

-Lord Millett, *Bristol and West Building Society v Mothew*

Power of Attorney

- A power of attorney (POA) or letter of attorney is a written authorization to allow a person (“the Attorney”) to represent or act on another's behalf in private affairs, business, or some other legal matter. The person authorizing the other to act is the *principal*, *grantor*, or *donor* (of the power).
- The Attorney owes fiduciary duty to the grantor.

Office of the Public Guardian & Trustee

- The Office of the Public Guardian and Trustee (“OPGT” or “PGT”) delivers a unique and diverse range of services that safeguard the legal, personal and financial interests of certain private individuals and estates.
 - <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/default.asp>
- The legislation provides that the PGT may be appointed Attorney.

Legislative Framework

- *Substituted Decisions Act* (S.O. 1992), ss. 7 - 14
- Grantor must have mental “capacity” to grant the POA (s. 8) at the time it is granted
- Grantor can have mental capacity to grant POA even if she is incapable of actually managing property (s. 9(1))

Legislative Framework

- POA document may authorize the named Attorney to do anything on grantor's behalf that grantor could do, if capable, except make a will (s. 7(2))
- POA must be executed in presence of two witnesses (who cannot be "interested" parties: i.e., like spouse of POA or grantor, etc.) (s. 10)

Legislative Framework (cont'd)

- POA is “continuing” if it states this and if it expresses intention that it may be exercised during grantor’s incapacity (s. 7(1))
- POA document may provide that it comes into effect on a future date or when a contingency occurs (s. 7(7)), and may be subject to conditions and restrictions
- POA can be in “prescribed form” but need not be (s. 7(7), (8))

Termination of POA

- S. 12 sets out various ways a POA can be terminated: Attorney dies or resigns, POA is revoked etc. (s. 12)
- Continuing POA will be terminated when the grantor executes a new continuing POA (unless grantor provides that there should be multiple POA's) (s. 12(d))
- No requirement (for termination in this fashion) that previous POA be notified

Termination of POA (cont'd)

- If a POA is terminated/ becomes invalid, any subsequent use of that power by the Attorney is still valid as between the grantor (or estate) and any person, including the attorney, who acted in good faith + w/o knowledge of the termination or invalidity (s.13(1))
- If a continuing power of attorney is ineffective because a person listed in subsection 10 (2) witnessed its execution, s. 13(1) applies, with necessary modifications (s. 13(2))

Fiduciary Obligation

- The Attorney has an obligation to exercise his power in the best interests of the grantor; i.e., the Attorney is a fiduciary.

Bank's Obligations/Liability

- *Vis a vis* a bank or credit union (“bank”), a legitimate Attorney is legally the same as the customer
- Therefore, a bank is obliged to respond to the Attorney's instructions, absent any unusual circumstances
- On the other hand, if the POA is not valid, a bank is not authorized to respond to the Attorney's instructions (s.t. section 13)

Bank's Obligations (cont'd)

- A bank or credit union (“bank”) normally has no obligation to monitor transactions in customer’s instructions
- Where there are “suspicious circumstances”, a bank is obliged to make such appropriate inquiries as would be made by a “reasonable banker” (objective test) [*Groves-Raffin v. BNS* (1975) 64 DLR (3d) 78 (BCCA)]
- Circumstances are unique to every case

Bank's Obligations (cont'd)

■ Potential liability:

- If bank acts on the strength of an invalid POA (i.e, lack of authority), then the bank may be liable to its customer or the Estate
- If there were suspicious circumstances, and if the bank failed to make reasonable inquires, AND if that failure led to a loss to the customer/estate, then bank could be liable in case of fraud or breach of fiduciary duty

Examples



Examples

1. Individual calls a lawyer and explains that his sister is in the hospital and unable to access her bank account. He requests that lawyer prepare a POA document for him, naming him as Attorney, so he can care for sister during her hospital stay.
 - potential problems?

Examples (cont'd)

2. John is Attorney for his sick mother and future executor to her estate. Evil brother Joe “lawyer shops” until he finds lawyer who will prepare new POA naming Joe as Attorney. Sick mother is bullied into signing and she dies 1 month later, after Joe has cleared out her bank accounts. John never notified of new POA until after mother died.

- problems or concerns?
- did mother have capacity re new POA?

Examples (cont'd)

3. Blind woman comes into bank with trusted care-giver. Care-giver presents a POA document naming her as Attorney. They explain that they wish to obtain mortgage on grantor's house (which she inherited). POA has provision that states POA in force only upon delivery of medical certificate (which has not occurred). Mortgage is granted; trusted care-giver pulls out all money.

- problems or concerns?
- POA valid? Suspicious circumstances?

Examples (cont'd)

4. An elderly member and his son attend to a credit union with a document identifying the son as POA for the member. Several months later the son attends to the credit union asking for a certified cheque in the amount of \$89,500 payable to JetSet Marine Ltd. from his father's account. When questioned about the transaction, he tells the credit union it is none of their business.

- problems?
- what if POA not properly executed?

Examples (cont'd)

5. A long-time bank customer asks to open a new account for his mother to receive her pension benefits. He advises that his mother is bed-ridden and unable to attend. He provides a properly executed POA dated 3 years earlier.
 - problems?
 - what if POA has been superseded?
 - what if POA not properly executed?

Additional Thoughts

- Not many safe-guards in the Act re POAs; there is no registry of POAs in court system and anyone can print out POA form and have elderly person sign it.
- Once new POA signed, it supersedes older POAs.
- A current Attorney can request, in writing, that bank branch advise if any subsequent POA is filed with the branch.

Additional Thoughts

- Banks and credit unions want to help in cases of elder abuse, but they will not wish to decide the merits of a fight between two opposing sides.
- The PGT exists in order to protect the vulnerable such as elderly or infirm. PGT has a “help” line

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Background

- Reid Lester is a Partner at the firm of Laishley Reed LLP, in Toronto. Mr. Lester was admitted to the Ontario bar in 1990 after graduating from Queen's University with a Bachelor of Laws in 1988. He received a Bachelor of Arts in Economics (Honours) from the University of British Columbia in 1981, and a Masters of Arts in Economics from Queen's University in 1982. He also worked as an Economist in Ottawa for 4 years from 1983 – 1987 before completing his law degree. Mr. Lester has spent his entire legal career in Toronto, where he articulated and worked at a large National firm in the early 1990's before moving to an Insurance "boutique" firm where he practiced for over 11 years. He spent a further three years as a Partner at another National firm before moving to Laishley Reed LLP in 2007.

Areas of Practice

- Mr. Lester practices in the areas of Fidelity Insurance Law, Commercial Fraud, Banking and Bills of Exchange, Insurance, E & O and Indemnity and other property insurance recovery actions.

Professional Experience

- Extensive background in Fidelity Bond claims (both Crime policies and Financial Institution Bonds) providing coverage advice and defences where necessary, strategic guidance on issues and claims, underwriting and policy-drafting advice and guidance, as well as recovery work.
- Extensive experience in Commercial Fraud matters relating to Subrogation claims, Recovery claims, including Mareva injunctions, Anton Pillar orders, and tracing orders.
- Extensive experience in matters relating to Financial Institutions concerning bills of exchange issues, breach of trust matters, Canadian Payment Association clearing rules issues, and errors and omissions claims.
- Extensive background in liability and property insurance, both in providing coverage advice to insurers, and in defending liability claims and asserting subrogated recovery actions.

Professional and Community Activities

- Frequent contributor to industry seminars on Fidelity Insurance, commercial fraud, and banking litigation issues
- Member of the Canadian Bar Association
- Member of the Association of Certified Fraud Examiners, Toronto Chapter
- Member of the American Bar Association (Tort and Insurance Practice Section (Surety and Fidelity))