

**Uniform Law Conference of Canada (ULCC)**

**Toronto, Ontario**

**August 10 – 14, 2014**

**Civil Section Minutes**

**A HARMONIZED APPROACH TO ELDER FINANCIAL ABUSE IN POWERS OF ATTORNEY – Report**

Presenter: Kim Nayer, British Columbia

As a result of the federal government's commitment to eliminate elder abuse, the Minister of State (Seniors) has asked the ULCC to review legislation on powers of attorney in various Canadian jurisdictions, identify possible gaps and explore the need for harmonization in this area.

A power of attorney is a written, legal authorization to represent or act on another's behalf in private affairs, business or some other legal matter. It is a valuable financial planning tool: simple, flexible and protective of the autonomy of the donor. There are general and enduring powers of attorney. Powers of attorney are an application of the law of contract and agency. Provincial and territorial legislation establish rules about their use and their function when the person who grants the power becomes incapacitated.

In her report to the Conference, Kim Nayer said that studies have shown that financial abuse constitutes about half of all elder abuse and that the law has been less effective in its deterrence in comparison, for example, to physical abuse.

The report, which presents policy recommendations on uniform safeguards against the misuse of powers of attorney, reviews provincial and territorial legislation on powers of attorney. It notes some existing safeguards in many of the legislative schemes such as stating the requirements for the creation of a power of attorney, duties of the attorney, responsibilities for accounting and involvement of the Public Guardian and Trustee.

The report says that existing safeguards offer at best only passive and incomplete protection. It recommends that uniform legislation be developed to provide for a strong and active regime that deters misuse of powers of attorney in financial exploitation of elders.

The report highlights existing legislative provisions in four areas that can be harmonized to help prevent elder financial abuse. These provisions relate to:

- The creation of the power of attorney – formal requirements vary considerably among Canadian jurisdictions.

- Expression of duties – need for clear communication that the stated duties of an attorney to a donor are fiduciary and to be performed in good faith.
- Accounting – variation in the requirements for monitoring or supervising an attorney’s execution of duties.
- Public Guardian and Trustee – providing a role for this office to oversee accounting and other financial measures.

To increase safeguards, Ms. Nayyer identified provisions in some existing legislation that could be incorporated into proposed uniform legislation. Such laws include the British Columbia *Power of Attorney Act*, the Yukon *Enduring Power of Attorney Act*, the Manitoba *Powers of Attorney Act* and the Saskatchewan *Public Guardian and Trustee Act*.

The report also suggests implementing further safeguards in uniform legislation including the following:

- Providing for clear expression of the duties of the attorney, their fiduciary nature and the standard to which the attorney will be held.
- Requiring notice, acknowledgment and acceptance of the attorney’s duties, and the incapacity of the donor.
- Clarifying and extending the duties to keep accounts to prevent co-mingling of funds or exploitation of the donor’s assets.
- Providing remedial powers relating to reporting misconduct, prevention of abuse and protection of assets by freezing accounts, and to investigate.

In discussing the report, it was pointed out that providing further safeguards in legislation on powers of attorney should be balanced with educating elders on the issue of financial abuse.

In view of article 12 of the UN *Convention on the Rights of Persons with Disabilities*, the Conference suggested the issue of supported decision and substitute decision should be examined in consultation with offices of the Public Guardian and Trustee. There was also a discussion on issues relating to freezing of assets and proposal on a central registration system for powers of attorney.

**RESOLVED:**

**THAT** the Report be accepted; and

**THAT** a Working Group be established and that it:

- a. prepare uniform legislation and commentaries in accordance with the recommendations contained in the Report and the directions of the Conference; and
- b. report back to the Conference at the 2015 meeting.