

A Harmonized Approach to Elder Financial Abuse in Powers of Attorney Legislation

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Overview

- Elder financial abuse
- Powers of attorney legislation: Comparative study
 - Four areas
- Recommendations
 - Four areas

Elder financial abuse

- 1999 study:

Donald Poirier & Norma Poirier, Why is it so difficult to combat elder abuse and, in particular, financial exploitation of the elderly? ([Ottawa]: Law Commission of Canada, 1999).

- financial abuse constitutes as much as half of all elder abuse
- legal remedy or safeguard less effective than for, *e.g.* physical abuse

- Criminal law
 - Part IX, *Offences Against Rights of Property*, addresses theft and specifically theft by a person who holds a power of attorney in respect of the subject property.
 - Part X, *Fraudulent Transactions Relating to Contracts and Trade* details offences relating to fraud, including through misuse of identify information, falsification of records, and contract breaches that constitute criminal activity, and it also creates certain restitutionary remedies.

- Civil context:
 - Tools of financial planning and security for elders can be instruments of abuse and exploitation
 - Power of attorney:
 - application of the law of contract and agency: authorization by donor that attorney represent or act on donor's behalf in private affairs, business, or some other legal matter.
 - Enduring, contingent/springing powers of attorney: creature of legislation
 - take effect when the person who grants the power becomes incapacitated.
- Provincial and territorial legislation establish rules about their use

Powers of attorney legislation: Comparative study

- Studied provisions of all provincial and territorial legislation and Québec Civil Code governing or addressing powers of attorney and enduring powers of attorney
- Included substitute decision-making for financial affairs
- Studied judicial consideration of this legislation
- Outlined comparative highlights of relevant provisions from each jurisdiction's legislation compiled in Appendix
- Also studied US uniform provisions, similar law reform initiatives in foreign jurisdictions

- Current legislative provisions for powers of attorney and enduring/contingent/springing powers of attorney
- Similar in purpose and function → promote independence and financial planning
- Different approaches:
 - some → outcome of different chosen approaches
 - others → legislative reform and amendment already
 - yet others → significant reform though practical effect not yet widely apparent: further administrative framework

- Jurisdictions vary, and some minimally useful safeguards exist:
 - creation of the attorney–donor relationship [20]–[25]
 - expression of duties [26]–[27]
 - accounting [28]–[30]
 - public official: Public Guardian and Trustee [31]–[37]
- Abuse continues to be observed, and legislation on this would benefit from reform and harmonization

Comparative study: Creation of attorney–donor relationship

- In some jurisdictions, the duties are fairly detailed; in others they are nearly bare.
 - most jurisdictions contain provisions somewhere in the middle.
 - Some jurisdictions supply an optional form.
 - Some are drafted in plain language.
- Where the rules and formalities are so highly specific and extensive as to be onerous, they might not be understood or respected → defeat value as a safeguard.

Comparative study: Expression of duties

- Some variation in the detail and language with which legislation expresses the nature of an attorney's duties.
 - Duty is fiduciary; sometimes expressed as such.
 - Other times is expressed in detail, in plain terms that reflect the fiduciary nature of the relationship.
 - Some differentiate between paid and unpaid attorneys.
- Clear, specific communication of the meaning of the attorney's fiduciary duties donor is a fiduciary one can assist good-faith performance of those duties.

Comparative study: Accounting

- Some jurisdictions expressly provide for an accounting.
 - Variations: in circumstances requiring; at whose initiative accounting required; to whom provided.
 - Usual provision: upon application to court by donor or interested person; non-waivable.
 - Held to include power to make remedial order.
- Where donor already subject to exploitation, costly court proceedings → not ideal.

Comparative study: Involvement of a public office

- A few jurisdictions expressly contemplate the office of the Public Guardian and Trustee at different points.
 - PGT can be designated attorney.
 - Option to deposit executed enduring power of attorney with PGT.
 - Person can report suspected abuse to PGT.
 - PGT can have power to exercise protective measures.
- Robust PGT can exercise oversight role, protective powers
→ security, litigation relief.

Recommendations

- Guidance from previous work
 - Alberta Law Reform Institute, *Enduring powers of attorney : safeguards against abuse* (Edmonton: The Institute, 2003) (note 13)
 - Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform ([Canada]: Western Canada Law Reform Agencies, 2008) (note 13)*
- Additional
 - Donald Poirier & Norma Poirier, Why is it so difficult to combat elder abuse and, in particular, financial exploitation of the elderly? ([Ottawa]: Law Commission of Canada, 1999). (note 1)
 - Andrew H Hook and Lisa V Johnson, “The Uniform Power of Attorney Act” (2010) Real Property, Trust and Estate Law Journal 283. (note 3)
 - New Zealand Law Commission, *Misuse of Enduring Powers of Attorney* (Wellington: Law Commission, 2001). (note 16)
 - Law Reform Commission of Ireland, *Report: Vulnerable Adults and the Law*. Dublin: Law Reform Commission, 2006. (note 32)

Recommendations

- Legislation in this area would benefit from four harmonization and reform in four specifics:
 - Clear expression of the duties of the attorney, their fiduciary nature, and the standard to which the attorney will be held. [44]–[54]
 - Notice, acknowledgment, and acceptance of the attorney's duties, and the incapacity of the donor. [55]–[64]
 - To keep and provide an accounting. [65]–[74]
 - Legislated remedial powers relating to reporting misconduct, prevention of abuse and protection of assets by freezing accounts, and to investigate. [75]–[93]

Clear expression of the duties of the attorney

- “increased awareness by attorneys of their duties is likely to decrease the risk of misuse of authority because informed attorneys are likely to be vigilant attorneys” –WCLRA 2008
- clear expression of fiduciary nature
- no room for attorney to be unaware donor’s interests govern.
- consistent expression and specification of duties → misunderstandings, permit consistent interpretation, maximize portability value

- Recommended elements, in plain language to prevent misapprehension [48]–[54]:
 - act honestly, good faith, in interests of donor
 - consider known wishes of donor
 - use assets of donor in best interests of donor
 - keep donor's property separate
 - keep records of financial transactions
 - standard of prudent person
 - limitations on remuneration, per instrument
 - limitation of liability

Notice, acknowledgment, acceptance

- To be held to the standard of the role, attorney should be known to have understood and accepted duties.
- Establish attorney's understanding and acceptance of duties at donor's incapacity
- Give notice to relevant others about attorney acting without oversight of donor
- Specify how, to whom notice delivered

- Recommended elements [56]–[64]
 - Non-waivable
 - Notice to, acknowledgment, acceptance by attorney at time of donor's incapacity
 - Notice to others after a reasonable period from the donor's incapacity:
 - to donor's family members
 - to financial institutions
 - to persons responsible for aspects of the donor's care
 - to the donor
 - to Public Guardian and Trustee
 - Set out duties and attorney's acknowledgment and acceptance
 - Optional form
- Consider registration system, noting administrative, privacy implications

Accounting

- Engage accounting duties as supervisory mechanism
- Utility not only as record-keeping but also to support remedy
- Beyond passive reporting of accounts on request or court order → regular reporting
- Overly onerous obligation → slips or failure of duty

- Recommended elements [65]–[74]
 - specify records to be kept; form (SK)
 - donor's records to be kept separate
 - minimum: immediate family members on request; other persons named in instrument
 - define interested persons to apply to court for details
 - define interested persons to ask PGT to direct details
- Consider
 - annual reporting (MB experience)
 - reporting to PGT

Remedial, abuse prevention power

- Clear expression of fiduciary role → clear consequences of failure in role
- Resort to termination of instrument should be a later recourse.
- Remedial mechanism should permit report of suspected abuse, and should enable halt of suspected abuse.
- Mechanism should include specific freezing powers to protect donor's assets.
- Mechanism should enable investigation
- Model: SK

- Recommended elements [83]–[92]
 - define financial abuse: misappropriation of funds, resources, or property by fraud, deception, or coercion.
 - enable termination of instrument or only substitution of attorney
 - Vehicle for remedies encompass other legislation, not only power of attorney legislation
 - designate office to receive reports (PGT)
 - protection for person reporting in good faith
 - enable persons to independently apply for remedy including termination or substitution

- Model: SK PGT Act remedial provisions (ss 40.5, 40.7–40.9)
 - empower PGT to investigate allegations on suspicion of breach of at minimum one duty
 - on PGT reasonable belief or allegation received: can require accounts suspended 30 days; allow appropriate payments
 - require financial institution to provide information
 - PGT able to seek warrant to search premises for and take possession of records
 - financial institution able to freeze on own motion on reasonable belief 5 days and immediately report to designated public office
 - (consider: option for other public office than PGT)

Thank you...

Discussion