

**Seniors Resource Centre of Newfoundland and Labrador
Advocacy Committee**

Discussion Paper

Enduring Powers of Attorney

Summer 2014

Introduction

A power of attorney is a useful legal tool which permits a person, often referred to as a donor, to have another person take care of their financial affairs. Under common-law, the power of attorney would become void if the donor lost his or her mental capacity. In an effort to ensure that citizens could appoint someone to take care of their financial affairs after mental or physical incapacitation, provinces throughout Canada passed enduring powers of attorney legislation. The legislation had the effect of permitting the power of attorney to operate after mental incapacitation of the donor.

In this province the *Enduring Powers of Attorney Act* (the Act) is relatively straightforward. Because enduring powers of attorney (“EPAs”) do not have to be registered there is little statistical evidence as to how broadly they are used or the extent of problems associated with their use. Anecdotally, lawyers and financial institutions advise that EPAs are becoming important tools for estate planning.

These documents are becoming increasingly popular because of their ease of use. They are easy to draft and require only the signatures of the donor and one witness. The ease with which EPAs can be drafted may lead to abuse. Unfortunately, vulnerable adults, sometimes seniors, are victimized by unscrupulous family members or associates who coerce the execution of EPAs.

Can amendments be made to the existing Act to prevent or mitigate abuse associated with the use of these documents? This discussion paper outlines some possible amendments which might achieve that goal.

Witnesses

Under the current legislation only one witness is required to execute an EPA. The Queensland Law Reform Commission, when it studied EPAs, noted the following:

The requirement of an independent witness is an essential safeguard for the donor. Elderly people, for example, may be susceptible to pressure to grant enduring power of attorney to a particular person or in a particular way. The presence of an independent witness who must certify the donor's capacity serves to lessen the risk of exploitation of this kind.

There are three aspects of the witnessing of EPAs which should be discussed. First, how many people should be required to witness the execution of an EPA? Second, what characteristics should those witnesses possess? Finally, what precisely are these individuals required to witness.

It appears that most jurisdictions require that two witnesses execute an EPA. While a conspiracy among two individuals as witnesses to defraud the donor is possible, it becomes increasingly more unlikely just by virtue of doubling the number of people

involved in the process. As well, the requirement to have two witnesses would not unduly burden the process of execution.

A thornier issue centers on the characteristics of potential witnesses. In Manitoba for example, EPAs made after April 1997, must be witnessed by a person from one of the following professions:

- a person qualified to be registered to solemnize marriages;
- a judge, justice of the peace or magistrate;
- a qualified medical practitioner;
- a notary public;
- a lawyer entitled to practice law;
- a member of the RCMP or the provincial police force.

Is the requirement that a witness be a member of one of these professions so onerous as to undermine the flexibility usually associated with EPAs? A more flexible approach may be found in the Ontario *Substitute Decisions Act* which states that the following persons shall not be witnesses:

- the attorney or the attorney's spouse or partner;
- the grantor's spouse or partner;
- a child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child;
- a person whose property is under guardianship or who has a guardian of the person;
- a person who is less than 18 years old.

The last consideration about the witnessing of EPAs deals with what precisely the individuals who act as witnesses are obliged to observe and document. The Queensland Law Reform Commission recommended that witnesses should sign a witness certificate confirming eligibility that they are among the list of professions which can witness the document. As well, they would have to state that the donor appeared to understand the effect of the power of attorney when signed. This is an attractive idea as it turns the mind of the witness to the capacity of the donor when the document is being executed.

In summary then, should the *Enduring Powers of Attorney Act* be amended so that two witnesses are required to execute enduring power of attorney? Should those witnesses possess specific characteristics which enhance their independence? Finally, should they be asked to sign a certificate verifying that to the best of their information and belief the donor had mental capacity?

Standard Forms

Many commentators have suggested that there exists too many versions of EPAs. Law firms and financial institutions tend to draft their own documents. Individuals are free to

adopt any version of an EPA they wish subject to it complying with the minimum standards set out in the Act. Given the various iterations of an EPA, many jurisdictions have simplified the process by including standard forms in EPA legislation.

The benefit of a standard form EPA is that it would guarantee the documents compliance with applicable legislation. As well, the form could be accompanied with annotations which clearly set out the duties and obligations of the donor and the attorney.

If a standard form is set out in legislation, should its use be mandatory? Many argue that the primary benefit of EPAs is their ability to be flexible and adaptable to a variety of situations. By making a particular form mandatory, this might lessen the circumstances where an EPA could be used.

Perhaps a middle ground is achievable. A standard form incorporating the strict requirements of the EPA legislation could be appended to the Act. The standard form could outline the responsibilities of the grantor, attorney and witnesses. In this way it could serve an education function and be readily available for the vast majority of people who require an EPA. By making it voluntary, however, the EPA could be modified and configured to address any unique circumstances or relationships that could benefit from its execution.

Should the Act contain a standard form EPA and, if so, should its use be mandatory?

Contingent Powers of Attorney

As a general rule, EPAs come into effect once they are properly executed. The attorney, therefore, has the authority to act on behalf of the donor even though the donor is fully capable of handling his or her affairs. This legal status is not precisely congruent with the intentions of many donors when they execute the EPA. Most wish for the document to become operative upon incapacity.

Section 7 of the Ontario legislation states that a continuing power of attorney may provide that it comes into effect on a specified date or when a specified contingency happens. If the EPA provides that it comes into effect when the grantor becomes incapable of managing property, but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when the attorney is notified in a prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property, or the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under Ontario's *Mental Health Act*. "Assessors" under Ontario legislation are professionals designated by regulation. Our province does not have a similar regulatory framework for designation of assessors, but clearly, doctors and nurses could be substituted for assessors.

The Alberta EPA legislation takes a slightly different tact. It states that an EPA may provide that it comes into effect at a specified future time on the occurrence of a specified contingency, including, but not limited to, the mental incapacity or infirmity of the donor. The EPA may name one or two persons whose written declaration specifies that the contingency has conclusively occurred for the purposes of bringing the EPA into effect. If no such persons have been appointed by the EPA, two medical practitioners may declare, in writing, that the specified contingency has occurred.

Is there merit in amending the act to provide for EPAs coming into effect only upon the occurrence of a specified contingency like a declaration of mental incapacity?

Characteristics of an Attorney

The act is silent about what characteristics an attorney should possess. It merely states that an attorney shall exercise his or her powers in the manner that protects the best interest of the donor and where the attorney fails to do so the attorney shall be liable to compensate the donor for loss occasioned by the attorney's failure. As well, the attorney is considered to be a trustee of the property of the donor. The usual common-law obligations of a trustee are therefore imposed upon an attorney.

Are there other characteristics of an attorney which should be specified in the Act? Legislation in other provinces, and commentators, have outlined a variety of other characteristics which should be codified in legislation. It has been stated that the attorney should be:

- ordinarily resident in the province;
- not bankrupt;
- not convicted of fraud and fraud related offenses unless he or she has been pardoned;
- not a person or institution which receives remuneration for personal care or health care of the grantor.

Of these four characteristics, the last may be the most controversial. Much has been written about the necessity of attempting to avoid conflicts of interest when choosing attorneys for EPAs. Inevitably, if the flexibility of an EPA is to be respected, some conflict of interest has to arise. In many cases the attorney will be a beneficiary under the state of the donor and, therefore, has a direct interest in the donor's financial affairs. The donor will have understood the nature of this conflict of interest but proceeded to appoint the attorney because of trust and the natural love and affection between the parties. When, however, a person or institution receives remuneration for the care of the donor, the conflict of interest may be elevated to a level which should be prohibited by law.

Should the act be amended to list the minimal requirements of an attorney, and if so, what should those requirements be?

Abuse

Powers of attorney and EPAs have historically been characterized as private arrangements. As with private contractual relationships the courts were available to intervene by ensuring fairness through the application of common law principles. Legislation was utilized primarily to ensure that an EPA would still be functioning after the incapacity of a donor.

Given the private nature of EPAs, the best way to avoid abuse of the donor and the mitigation of his or her estate is to pursue three objectives. The first is education. Abuse can be avoided when the donor is fully aware of the consequences of executing an EPA; has exercised due diligence in choosing an attorney, and has placed legal safeguards in place like the establishment of joint bank accounts. The second is to ensure the integrity of the execution process. Many of the discussion points previously outlined in this paper address this issue.

A third mechanism to prevent abuse is to codify specific measures in the Act which permit the investigation and adjudication of allegations of abuse. Section 9 of the Act provides for the following:

- the replacement of the attorney if he or she becomes incapacitated;
- the ability of the public trustee to apply to court for substituting one attorney for another named in an EPA where it appears to the trustee that to do so would be in the best interests of the donor or the donor's estate; and
- the ability of an attorney to apply to court for an order that some other person replace him or her as attorney.

Section 10 of the Act permits any person with an interest in a donor's estate to apply to court for an order having the attorney account for all transactions involving the estate.

These provisions generally mirror those in EPA legislation in other provinces. It appears that the public trustee must have some implied power to investigate allegations of abuse; otherwise, on what basis could he apply to court for an order to have an attorney replaced utilizing section 9 of the Act. Should the public trustee's powers to investigate allegations of abuse be more explicitly delineated?

Some commentators have suggested that attorneys appointed under an EPA should file with the public trustee annually a statement of account for the estate. The merits of this proposal are debatable. It has been pointed out that the amount of work associated with annually filing accounts might prohibit people from acting as attorneys. As well, any unscrupulous attorney would have the predisposition to file falsified or fraudulent accounts.

In closing, should the Act be amended to specifically outline the powers of the public trustee to investigate allegations of abuse in the administering of an EPA and should

attorneys be required to file with the public trustee annual accounts of the estates they administer.