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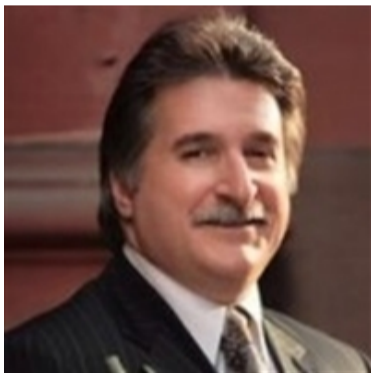
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# Abuse of funds may not start with criminal intent



The [Substitute Decisions Act](#) would benefit from an amendment that makes it mandatory for accounting responsibilities to be set out in a power of attorney (POA) document, forcing individuals to acknowledge what their duties are before taking on the role, says Toronto-area estates litigation lawyer [Charles Ticker](#).

In a discussion on POA abuse, Ticker tells [AdvocateDaily.com](#) problems can start from the moment someone is named an attorney. It's unlikely, he says, that anyone who's not a professional would truly understand what's expected when they agree to

act as attorney under a POA – and as some reported cases indicate, there are even professionals who do not fulfill their fiduciary obligations.

“There’s no requirement anywhere in our law to put the accounting responsibilities right in the document,” says Ticker, noting in jurisdictions like New York and Illinois, such duties are set out in writing, and the recipient must sign and acknowledge what the responsibilities are.

“We don’t have that in Ontario. You see a lot of instances where it will arise after death, where siblings turn to the person acting as attorney under a POA and say, ‘What happened to the money, and how did you handle it?’ If that person hasn’t kept proper accounting books, vouchers and receipts, they may be ordered to pass accounts and they’d have to try to recreate the accounting because they haven’t kept proper records.”

Ticker says: “I can’t tell you how many times I’ve written letters for people seeking accounting under the POA saying, ‘These are your duties and I hope you complied with them,’ and they panic because they haven’t. Sometimes it’s quite innocent, and sometimes it isn’t.”

When it comes to choosing an attorney, Ticker says the gravity of the role must not be forgotten.

“They have to know that the person could cause damage by mismanaging the assets, and if they’re managing assets, they might do something totally dishonest and dissipate the assets by negative means,” he says.

Misuse of the position can take shape in many forms, says Ticker, from poorly managed properties to theft.

“I’ve seen other cases where someone is acting as attorney and the parent is not mentally competent and instead of going to the bank and saying they’re going to manage the account for their parent, they go beyond that and close the account and move everything into their own account, co-mingling their funds with their parent’s funds,” he says. “When they have to give an accounting down the road it’s a real mess.

“You’ll see other people acting under POAs making agreements with themselves, where they say, ‘Dad’s 95, let’s just take an advance on the inheritance,’ and they justify taking the money that way.

“Then you have the other end of the spectrum, where people are out-and-out stealing. They’re acting as an attorney for someone, but acting as if the money is their own,” says Ticker.

“By the time they’re caught, there’s nothing left, so you could get the criminal justice system involved, but that’s not much solace to a person whose life savings has been lost. This would be the extreme, but we’re seeing it more and more. Studies have shown the biggest perpetrators of elder financial abuse are family members.”

Misuse of funds doesn’t always begin with criminal intent, says Ticker, but “the temptation for some individuals to have access to all this money is too great.”

Having more than one person dealing with a property is one way to avoid such situations, says Ticker. Parties can also include a provision in their POAs that regular updates have to be given to all family members on a monthly or quarterly basis, adding accountability to the process. Ticker suggests that a copy of the regulation under the Substitute Decisions Act setting out the record keeping requirements be attached to the POA.

Ultimately, ensuring these files are handled properly starts with who is selected to manage them, says Ticker.

“The person you appoint is of utmost importance,” he says. “I think if lawyers express to their clients the potential harm that’s possible, and make sure that’s understood, it would give individuals a lot more to think about.”

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