



Planning After Incapacity

STEP ATLANTIC

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Introduction

- Canadians living longer
- Increasing incidence of incapacity from Alzheimer and related dementias
- Increasingly complex tax laws
- High probate taxes in several jurisdictions



Introduction (cont'd)

- Increasing incidence of estate litigation
- Increasing incidence of dependants' relief claims
- Attorneys, children, beneficiaries questioning – can planning be done for an incapacitated person and if so how?



Outline of Presentation

- Survey of common law and legislative history of POAs
- Case law regarding the authority of others to effect estate planning for an incapable person
- Developing law regarding an attorney's authority to conduct estate planning
- Case studies



- Identifying the Source of an Attorney's Power

Survey of History of POAs



Powers of Attorney – Common Law

- Long common law history of powers of attorney
- Governed by law of agency
- No practical distinction between powers of attorney and other agency relationships until statutes enacted
- Both give rise to fiduciary obligations and duties of trust and confidence between agent and principal
- Agent's authority could be general or limited



Powers of Attorney – Common Law (cont'd)

- Common law - no requirements for form of agency (need not even be in writing)
- Other statutes (such as those dealing with interests in land) may impose certain requirements, as might third parties like financial institutions
- Statutes subsequently modify this also



Powers of Attorney – Common Law (cont'd)

- Capacity to make power of attorney at common law – generally thought to be less than for testamentary capacity (*Re: K vs. Banks v. Goodfellow*)
- Donor generally must be aware of role/duties of an attorney and that attorney can continue to act if donor loses capacity, as well as awareness of assets and family/dependants – rebuttable presumption of capacity at time POA is made



Powers of Attorney – Common Law (cont'd)

- Consider whether test is really different for *inter vivos* transfers, or whether it is a variable test depending on nature and scale of gift (*Ball v. Mannin*)
- Test subsequently set out expressly in some statutes
- At common law, the mental incapacity of the principal terminated all agency relationships
- Problem when agent continues to act without knowledge of principal's incapacity



Powers of Attorney – Common Law (cont'd)

- Common law imposes the fiduciary responsibilities to:
 - Act honestly, in good faith and in the donor's best interests
 - Exercise the care and skill that a reasonably prudent person with the attorney's experience and expertise would exercise
 - Use the donor's assets for the donor's benefit
 - Avoid conflicts of interest and commingling of assets
 - Act within the scope of the power
 - Not delegate authority unless specifically authorized to do so



Powers of Attorney – Common Law (cont'd)

- Encoded in statute in some jurisdictions, but does not displace common law
- Rebuttable presumption that attorney intends to act in donor's best interests
- Remedy for breach of fiduciary duty by attorney is often constructive trust



Powers of Attorney – Common Law (cont'd)

- A principal cannot grant testamentary powers to an attorney (eg. attorney cannot make a will for the donor)
- This includes beneficiary designations that are testamentary dispositions (ie revocable and with effect only upon death)
- Other limitations on attorney acting on behalf of donor:
 - Exercise a discretionary power
 - Act as trustee
 - Marry
 - Serve a prison term



Powers of Attorney – Statutory Reform

- Various historical efforts at law reform prior to 1979
- 1979 Uniform Law Conference of Canada publishes a Uniform Act
- Largely adopted between 1979 and 1991 in all provinces across Canada



Powers of Attorney – Statutory Reform (cont'd)

- Permitted the agent/attorney to continue to have authority to act “notwithstanding any mental infirmity of the donor”
- Prescribed that the document must be “signed by the donor and a witness, other than the attorney or the spouse of the attorney”
- Major reform proposed in 2008 by Western Canada Law Reform Agencies



Powers of Attorney – Statutory Reform (cont'd)

- Various uniform provisions recommended for
 - Inter-jurisdictional recognition
 - Duties of attorneys
 - Safeguards against misuse
- Legislative changes have occurred in British Columbia and Saskatchewan – other provinces considering further changes
- Enduring powers of attorney are purely statutory



Powers of Attorney – Statutory Reform (cont'd)

- If no prohibitions (against gifting, loans and donations, for example) can a donor authorize the attorney to do anything the donor could do?
- Restrictions on the attorney may be imposed by the donor (in the document itself), the common law, the statute or third parties



Powers of Attorney – Statutory Reform (cont'd)

- Donor imposed limitations could include:
 - The property or assets covered by the power
 - Geographic scope
 - The purpose of the power
 - The time period under which it may be used



Powers of Attorney – Statutory Reform (cont'd)

- British Columbia and Saskatchewan restrict gifts by donors by statute, but a Saskatchewan Court can authorize a gift “if the Court is satisfied that it would be appropriate for the property attorney to make the gift”
- Does an attorney’s fiduciary obligation prohibit or restrict gifting in any event?
- Does an express power to gift in the power of attorney override that?



Powers of Attorney – Statutory Reform (cont'd)

- Does the same apply for effecting estate or tax planning transactions considered by the attorney to be in the best interests and consistent with the known estate plan of the donor if there is an express power to do so?
- Should the attorney be able (or even required) to satisfy legal obligations of the donor to maintain and support another person, or to provide maintenance, education, benefits and advancement for a spouse or dependant child?



Powers of Attorney – Statutory Reform (cont'd)

- What if the attorney is the spouse or dependant child of the donor?
- The answers to these questions are still being developed in the law in Canada...



Guardianship/Committeeship/Trusteeship

- Similar rules apply to guardians/committees/trustees acting under provincial adult incompetence legislation
- Statutes often old
- Modern statutes becoming more prevalent (i.e. BC and other provinces)
- Major difference – guardians/committees/trustees under court supervision at all times but attorneys only under court supervision when an interested party applies for relief



Guardianship/Committeeship/Trusteeship (cont'd)

- Court approval of transactions is typically required – third parties will not rely on the general authority of the guardian/committee/trustee without an express further order (i.e. for sale of land of the incompetent person)
- Test – best interests of the incompetent
- Is “not detrimental to” the incompetent good enough?
- Nova Scotia *Variation of Trust Act* now uses that test



Case Law

- Common Law Scope of a Representative's Power to Plan for an Incapable Person



Survey of Case Law

- Estate planning for the incapable person by:
 - Statutory wills – Canada and other jurisdictions
 - Guardian/Committee/Trustee appointed by the court
 - Power of attorney appointed by the donor



Statutory Wills

- Conferral of the right for a will to be made/revoked/amended for an incapable adult
- New Brunswick is only Canadian jurisdiction to permit statutory wills
- UK, Australia and New Zealand have legislation to permit statutory wills



Re M (NBQB)

- Committees (wife and trust company) sought court approval (with children's consent) to make a will for incapable husband, who had no will, to leave entire estate to wife on his death and children equally if wife predeceased husband
- Court held that the proposed will was what "the incompetent person might do if he had remained competent" and authorized the will by the committees



Re M

- Test applied by the court is “subjective test” of what the incapable person would have actually wanted were he momentarily competent
- Court relied on the statutory power for a committee to make a will subject to court approval, which exists only in New Brunswick



The Powers of an Attorney

- Planning involving designations



LeBouthillier, 2013 NBQB 404, 2014 NBCA 68

- Husband had designated wife as beneficiary of account
- Contested committee ship over incapable husband between wife and children
- Son, using enduring power of attorney, changed the designation on the account, removing the wife as beneficiary
- No evidence that husband wanted to change designation prior to incapacity



LeBouthillier

- Trial court found that the son had same powers as father and could change beneficiary designations and validly did so by using the power to take steps consistent with the father's wishes
- Court of Appeal overturned and found there to be no authority for the attorney to change or revoke a designation following incapacity, as that is a testamentary disposition and not an *inter vivos* gift



Desharnais, 2002 BCCA 640

- Common law spouse, who was the attorney, was designated beneficiary of incapable adult's RRSP but not a beneficiary under the adult's will
- In the course of management of the incapable spouse's assets, the RRSP was moved from one institution to another at the recommendation of the bank to the attorney
- This act effectively revoked the designation in place



Desharnais

- Court held that there is no authority for an attorney to make/revoke or change a beneficiary designation, after the adult's incapacity, in a general enduring power of attorney document
- Court also found that a beneficiary designation was a testamentary disposition and that the change of the designation was done without compliance with the requirements for a valid will



The Powers of a Committee

- Planning with the Court's Approval



O'Hagan v. O'Hagan, 2000 BCCA 79

- Committee son sought court approval for an estate freeze (for tax reasons) of father's shares, with the growth shares going into a trust for father's benefit during his lifetime (which he could take back if capable) and to the two children equally on father's death or their issue if predecease father
- Court approved the plan, applying the "reasonable and prudent person of business" test



O'Hagan v. O'Hagan

- Court found that the freeze and trust:
 - did not decrease incapable adult's assets (growth shares were held in a trust for the benefit of the father during his lifetime)
 - disposed of assets after the father's death in a manner consistent with his will
 - transactions were not a “necessity” (not required for approval) but were in the adult's “best interest”



Re Bradley, 2000 BCCA 78

- Committee husband sought court approval of *inter vivos* outright gifting of patient's assets to reduce taxes otherwise payable at death
- Court refused approval, applying the “reasonable and prudent person of business test”, noting that the plan would reduce the patient's assets during her lifetime and would not be in keeping with her ultimate estate distribution, which was an intestacy



Re Bradley

- Plan involved non-taxable gifting of several hundred thousand dollars over several years under US gifting laws, to husband, sons and grandchildren in order to save significant US estate tax on her death
- The adult had no will and the intestacy scheme that would apply would not be consistent with the *inter vivos* gifting



Comparing Committee Cases

- **O'Hagan** – the assets remained owned by the patient until his death, through the trust. Further, the disposition of the assets post-death was the same as if they passed under his will
- **Bradley** – the assets were to be gifted away from the patient during her lifetime. Further, the gifting was not consistent with the disposition if those assets had passed after her death



Banton v. Banton, 1998 Ontario SC

- Enduring power of attorney granted by father to sons
- Concerns regarding caregiver after father's incapacity
- Sons settle father's assets into *inter vivos* trust for sole benefit of father during his lifetime and divided equally between the sons (and their issue) after his death, consistent with then known will
- Father marries after the trust is settled, revoking will



Banton v. Banton

- Trust was found to be invalidly settled by the attorneys as it was not in father's best interest because the assets after death do not fall within father's estate:
 - Wife would have had rights as intestate heir
 - Wife would have rights for dependant's relief
 - Wife would have had family law rights
 - Father could not replace trustees



The New Case – Easingwood

- Is the law now broader?



Easingwood v. Cockroft, 2013 BCCA 182

- Court considered testamentary planning using POAs and directly addressed the question of whether an attorney may settle an adult's property in an *inter vivos* trust
- Provides first example of court approving a plan of distribution through a trust separate from estate



Easingwood v. Cockroft (cont.)

Court of Appeal considered the following 3 issues:

1. Does the enduring POA authorize creation of an *inter vivos* trust?
2. Is the trust created testamentary in nature and therefore beyond the capacity of the attorneys?
3. Does the POA authorize creation of this trust?



Easingwood v. Cockroft (cont.)

1. Does the enduring power of attorney authorize creation of an *inter vivos* trust?

“in general terms, unless there is an external impediment to the creation of a trust, it was within the attorney’s power to create an *inter vivos* trust because it was within Reg’s power to do so.”

- No external impediments were found



Easingwood v. Cockroft (cont.)

2. Is the trust created testamentary in nature and therefore beyond the capacity of the attorney?

- Court acknowledged generally perceived rule against an attorney making a testamentary disposition
- Considered the meaning of a testamentary disposition: “A testamentary disposition is one that is dependent on death for its vigour and effect”



Easingwood v. Cockroft (cont.)

- Found that the trust was not dependent on Reg's death for its efficacy as it had been fully established, three certainties were met, and it was irrevocable
- Found the trust was not a testamentary disposition being made by the attorneys for Reg



Easingwood v. Cockroft (cont.)

- This point recently cited with approval by Ontario court (*Testa v. Testa*, 2015 ONSC 2381):

[92] I prefer the reasoning in *Easingwood v. Easingwood Estate*, 2013 BCCA 182 (CanLII), 85 E.T.R. (3d) 225, of the British Columbia Court of Appeal to that of *Bank of Nova Scotia Trust Co. v Lawson* (2005), 22 E.T.R. (3d) 198, [2005] O.J. No. 5356, (ONSC), and conclude that a continuing attorney for property can create an *inter vivos* trust that takes immediate effect, and is not dependent on the death of the settlor for its vigor and effect.



Easingwood v. Cockroft (cont.)

3. Does the power of attorney authorize the creation of this trust?

- Court looked to whether creation of this particular trust would result in a breach of the attorney's fiduciary duty and found none
- However, court opened the door for challenges to other trusts on the basis of a breach of fiduciary duty



Easingwood v. Cockcroft (cont.)

- Key factors:
 - Distribution provisions in the will and the trust were basically the same
 - No conflict of interest between Reg and attorneys
 - Trust created for sound reasons: POA could lapse if Hank predeceased Reg; attorneys obtained legal and financial advice before settling trust



Hollander v. Mooney, 2012 BCSC 1972

- Father made a number of estate plans, through joint tenancy with declarations of trust and wills
- Father becomes incapable and a contested committee arises between siblings
- Siblings make agreement that assets be held for father during his lifetime and shared amongst them on his death without regard to any of the estate plans
- Siblings are not the beneficiaries under the last will



Hollander v. Mooney (cont.)

- Court found the agreement to be in father's best interests and held that the sibling who was the father's representative (and attorney) could deal with the father's assets in such a manner
- Court found the agreement was an *inter vivos* settlement and, therefore, there was no will triggered on the father's death as no assets passed into the father's estate on death



Emerging Trends

- Is the door open?



Trends...

- Are the courts becoming more open to planning by attorneys on behalf of incapacitated donors?
- *Easingwood* potentially opens door to more creative planning after incapacity



Available Post-Easingwood Trust Planning

What trust planning is available post-*Easingwood*?

1. AET/JPT with distribution mirroring existing plan (will or intestate) – or other *inter vivos* trust with same terms
2. Self benefit trusts?
3. Bare trusts?



Is it open season for attorneys?

- Attorneys face a number of limitations
- What prevents us from going further and varying the terms of the last known will?
 - Statutory restrictions on gifting
 - Vested interests under the will
 - Breach of fiduciary duty
 - Risk of fraudulent conveyance



Limitations to Easingwood-style Planning

1. Statutory Restrictions on Gifting

- *Easingwood* was decided without reference to new POA provisions in BC which contain restrictions on gifting where not expressly permitted in document
- Would statutory restriction prohibit settling of this trust?
- Even without a statutory restriction, would an attorney's common law fiduciary duty prevent any gifting?



Limitations to Easingwood-style Planning

2. Vested Interests

- Consider nature of beneficiary's interest under will of an incapacitated donor
- Does donor's incapacity crystallize interests of beneficiaries under his or her will? (*Weinstein, Nystrom*)
- After donor's incapacity, such beneficiaries must at least be given notice of any change to the planning (*Kostrub v. Stuparyk*)



Limitations to Easingwood-style Planning

3. Fiduciary Duties

- *Easingwood* left open possibility of challenging trust made by attorney based on breach of fiduciary duty, but *what does this mean?*



Limitations to Easingwood-style Planning

[54] In reaching this conclusion, I do not put an *inter vivos* trust, fully created, as one beyond challenge by those who consider themselves aggrieved by its creation. Where, for example, a trust created by an attorney has the effect of adding beneficiaries not named in a will, or avoiding a gift established by a will, or disposing of assets where the principal has chosen not to make a will and the estate would be divided as provided in an intestacy, the trust may well be challenged, e.g., under the rubric of the attorney's duty to conform to the intentions of the principal. That is, ***the issue of breach of fiduciary duty would loom large***. All of these questions are live questions, requiring the determination of facts in a particular case.



Limitations to Easingwood-style Planning

- Whose best interests must we consider?
- *Sommerville* – duty to act in best interests not to be considered “in a vacuum” - may continue to provide for spouse or family where evidence of intention and done without compromising donor’s interests
- Court has found estate freezes done by committees to be prudent and, “in the large sense”, in best interests of principal



Limitations to Easingwood-style Planning

- Does “best interests” mean that we always have to mirror existing plan in place?
- Must we always accept that the last estate plan reflects donor’s wishes?
- What if donor’s wishes are not in donor’s best interests?
 - Subjective vs. objective test
 - If subjective, is it frozen in time at loss of capacity?



Limitations to Easingwood-style Planning

4. Avoiding Fraudulent Conveyances

- In *Mawdsley v. Meshen*, BCCA found that:
 - fact that transfer may have effect of defeating a claim does not require court to find required intent
 - person with no claim during transferor’s lifetime, and who only has wills variation claim arising on death of transferor is not a “creditor or other” with standing to challenge the conveyance as fraudulent



Limitations to Easingwood-style Planning

- Trusts may be used to avoid dependant relief/wills variation actions where transferor does not have any legal obligations to claimant during transferor's lifetime
- Transaction may still be set aside as a fraudulent conveyance where claimant can demonstrate transaction was intended to defeat a legal obligation that will-maker had during will-maker's lifetime



Statutory Wills

- Certain commonwealth jurisdictions have been granting a statutory power to create a will to address potential for hardship to family where will cannot be made because of lack of capacity
- United Kingdom, Australia and New Zealand have all introduced concept with high degree of success



Statutory Wills (cont.) – UK Experience

- Statutory wills regime in force in since 1969
- Relies on inherent jurisdiction of court
- Authorized court to order “execution for the patient of a will making any provision... which could be made by a will executed by the patient if he were not mentally disordered.”



Statutory Wills (cont.) – UK Experience

- Court filled in criteria upon which to base its decision
- Drew on cases dealing with court-ordered *inter vivos* gifts made from surplus income of persons under court's protection - concept of “substituted judgment”
- Took subjective approach and considered facts from point of view of incapacitated individual rather than from an external point of view (*Re. D. (J.)* [1982] Ch 237)



Statutory Wills (cont.) – UK Experience

- British legislative framework for statutory wills modernized in 2007 with *Mental Capacity Act 2005*
- Interestingly, British court has abandoned substituted judgment approach and replaced with “best-interests standard of care”, an objective test of what would be in person’s best interests



Statutory Wills – Australia & NZ

- Australia and New Zealand both allow statutory wills endorsed by the courts
- Court will approve if satisfied that the proposed will, alteration or revocation might be have been made by the proposed testator if he had testamentary capacity – this is the application of a subjective standard
- However, recent case law has questioned the use of the subjective approach



Statutory Wills – Canada

- Only Canadian jurisdiction to have aspects of a statutory will regime is New Brunswick, where provisions were added to the province’s adult guardianship statute in 1994
- Just one reported case to have considered the legislation.
 - In *Re M (Committee of)* court adopted Megarry VC’s five principles for “substituted judgment”



Statutory Wills (cont) - Canada

- Alberta Law Reform Institute explored allowing statutory wills but did not make a recommendation
- British Columbia Law Institute recommended introducing statutory wills in 2014



Statutory Wills (cont.) - Canada

Uniform Wills Act – 2012 Propositions

11. Court authorized wills

- (1) The power of the court to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person shall be exercisable in the discretion of the court where the court believes that, if it does not exercise that power, a result will occur on the death of the mentally incompetent person that the mentally incompetent person, if competent and making a will at the time the court exercises its power, would not have wanted.

Source: *Infirm Persons Act*, RSNB 1973, c. I-8, s. 11.1



What Does the Future Hold?

Thoughts On How Canadian Law Could Develop

- Statutory wills
- Increased powers for POAs
- Increased monitoring of POAs



Scenarios for Discussion



Scenario A

- Jane is single, age 45, high net worth, and has 2 adult children in their early 20s who are well-adjusted and in post-secondary education.
- Jane executes a standard POA with no express powers to gift or reorganize affairs and a will leaving her estate outright to her children equally
- Jane appoints her close friend, Mary, who has good relationships with both children as POA and executor



Scenario A (cont.)

- Jane is in a serious accident and is left severely incapacitated and with a shortened life expectancy
- Several years later, Jane's son develops a serious drug addiction, fails out of school, cannot hold jobs and begins to live on the street
- In a drug-induced state, Jane's son assaults his sister who is left disabled and unable to work in the future



Scenario A (cont.)

- Jane's health declines and Mary is told that Jane will soon die
- Mary believes that Jane, if she were aware of the current circumstances, would want to change her will to leave her son's interest in trust and increase the share for her daughter



Scenario A – Discussion Points

- Could Mary settle a trust and leave her son's share in trust for life?
- Could Mary go further and vary the relative distribution of the estate?
- Is it in Jane's best interest to settle such a trust?
- Is settling a trust in effect making a gift and is that authorized?



Scenario B

- Jack is 70 and widowed
- He has one adult son, Dan, with whom he has had a strained relationship
- After wanting to make no provision for Dan for many years, recently Jack added a specific gift to Dan to his will/trust, but he still wishes the bulk of his estate to go to charity



Scenario B (cont'd)

- After he turned 65, Jack settled an alter ego trust which provides for the gift to Dan and then allows charitable gifts from the trust prior to a residual gift to his private Foundation – his will has the same provisions
- The trust assets and its terms are such that the accountant has modeled that Jack will pay no tax on death, maximizing the amount going to charity
- Jack has now lost capacity and the alternate trustee (who also holds his power of attorney) is concerned about the effect of new ss. 104(13.4) of the *Income Tax Act* and the loss of charitable credit



Scenario B – Discussion Point

- Can the trustee collapse the trust and manage the assets in Jack's name personally via the POA?
- What is the appropriate balance between the competing goals of dependant relief protection and donation credit maximization?



Scenario C

- Donor is a 65 years old wealthy businessman who has no will
- Donor has 4 adult children from his first marriage with whom he is estranged, after he gave them generous gifts
- Donor is remarried to a 30 year old wife and has 2 minor children
- Donor is financially supporting his elderly parents



Scenario C

- Donor has made an enduring POA naming his business partner as his attorney.
- Before his unexpected incapacity, the donor told his business partner that he was about to see a lawyer and make a “family trust” and get his estate planning in order



Scenario C – Discussion Points

- Can the attorney settle the donor's assets into a trust?
- Does that depend on the applicable test:
 - Subjective (do not know his actual intentions)
 - Objective (apply a reasonable standard)
- How far can the attorney go in deciding on a distribution that departs from the intestacy provisions?



Planning Tips

- Consider providing for gifting and settling funds into trust in power of attorney document
- Consider adding provisions for effecting other estate planning transactions, including amending beneficiary designations
- Specify in trust document whether power to amend terms may be exercised only by the donor personally or by the attorney under an enduring power of attorney



Possible Clauses

- Power of Attorney
 - Shall continue to provide maintenance, education or other benefits for my spouse or dependent children as required by law.
 - May undertake estate or tax planning transactions which my attorney considers to be in my best interests and consistent with the terms of my will or other estate plan to the extent known, including settling trusts for my benefit and making, revoking or changing beneficiary designations for insurance policies and registered accounts.



Possible Clauses

- Power of Attorney
 - May continue to make any third party payments, donations or gifts which I have habitually made, such as charitable donations, holiday gifts or birthday gifts (including to my attorney), which my attorney considers reasonable.



Possible Clauses

- Power of Attorney

- May engage the services of investment counsel (including discretionary investment managers) to advise my attorney or to assist with the investment of my assets. Subject to my attorney's reasonable supervision, my attorney may delegate to an investment counsel the discretion to manage my assets or any part of them on terms and conditions my attorney considers advisable. That investment counsel may in turn sub-delegate the same discretionary powers on terms and conditions they consider advisable. My attorney may pay for the services of an investment counsel using the income or capital of my assets. The remuneration of any investment counsel is in addition to and shall not be taken into account when determining my attorney's compensation.



Possible Clauses

- Trust
 - *Reserved Powers.* The trusts created by this trust agreement are revocable during the lifetime of the Settlor and the Settlor may revoke or amend this Trust, without the consent of or notice to any beneficiary. The powers of revocation and amendment held by the Settlor may be exercised by the Settlor's duly appointed attorney. At the Settlor's death this Trust becomes irrevocable.



Questions?



Thank You!



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