



Abuse of Power

A growing number of elderly people are falling victim to those empowered to look out for them. What can you do to protect your clients?

By Olivia Li | January 2012

Gina MacDonald, an independent financial advisor from Vancouver, knows first-hand the difficulties of trying to protect an elderly client from an unscrupulous daughter who holds the client's power of attorney.

"Right from the start, the mother told me her daughter was trying to get her money," Macdonald told the audience during a question-and-answer session at a conference held by the Institute of Advanced Financial Planners in Toronto last autumn.

The daughter had asked to increase her mother's monthly withdrawals and had wanted to change her mother's portfolio weightings because they were somewhat conservative. When Macdonald reminded the daughter the money belonged to her mother, the daughter replied: "Well, this is going to be my retirement fund. I want to see more growth."

Macdonald persuaded the daughter to leave the portfolio as it was, reminding her that her duties as holder of POA were to serve her mother's interests, not her own.

Eventually, the daughter transferred her mother's investment account to a broker of her own choosing — and Macdonald never heard from the client again.

There is evidence that financial abuse of seniors by holders of POAs is on the rise in Canada. "It's a growing area of litigation," says Harold Geller, a lawyer with Doucet McBride LLP in Ottawa who represents financial advisors in litigation cases.

According to the Canadian Centre for Elder Law, one in 12 Canadian seniors is being abused or neglected. Most reported incidents are financial abuse. In British Columbia, one in 12 victims has lost more than \$20,000 as a result of elder abuse.

"With the aging demographic, more elderly people are at risk," says Léony de Graaf, a financial advisor in Burlington, Ont., who has seen her share of POA abuse. She suggests the "sandwich generation" of debt-racked baby boomers, struggling to take care of both parents and children, will be especially tempted by their looming inheritances.

There are safety measures and legal boundaries to keep in mind when talking to your clients about POAs and regarding how to act when POA abuse is suspected.

"The role of the [person holding the] POA," says John Poyser, an estate and trust lawyer with Inkster Christie Hughes LLP in Winnipeg, "is to make out an appropriate amount of cash to provide for care and to enhance the quality of life for the incapacitated ward. [The POA-holder] should be acting exclusively in the best interests of the ward. And, if the money is not going to run out, the [holder of the] POA is obliged to make those continuing outlays."

A POA-holder should be someone who comprehends your client's current health-care needs and their costs. The POA-holder must be a reliable record-keeper and money manager, and make prudent investments on your client's behalf without taking undue risks.

> Help Your Clients Determine Who Should Hold Their POA

If a client has not yet appointed a person to hold POA, you can help your client select an appropriate person. Although the POA documents will be drawn up by your client's lawyer, you can help by explaining the requirements of a POA to your client. Make sure your client understands that the person he or she designates will have the legal authority to make financial decisions or personal-care decisions — or both, depending on the document used — on your client's behalf. So, the person named to hold POA should be someone your client can trust. While you can offer advice, you cannot choose the person to hold POA.

Debra Stephens, a lawyer in Toronto with Jan Goddard and Associates, who specializes in guardianship and elder law, advises that you be tactful and thoughtful when broaching this topic. She recommends warning your client that POAs can be abused by asking your client: "What do you think will need to be done to address [abuse], if it happens in your case?"

As a preventative measure, you should recommend an informal background check of any candidate your client chooses. A person holding POA should have a healthy credit rating and be under no financial pressure; the candidate should not be struggling with a failing business, for example, or a gambling addiction.

> Be Aware Of Family Dynamics

Stephens tells of client, a blind elderly woman happily residing in a well-maintained care facility, who had received a visit from her son, a gambling addict whose home was mortgaged to the hilt. The son had the client sign a document revoking her original POA and granting POA to him. He then forged the signatures of witnesses on the document.

"He took every last cent the mother had," Stephens says. The client had to move into a government-subsidized institution and became unable to support her disabled daughter. The case was taken to court and the son paid the money back, Stephens says, but nothing could repair the emotional damage done to her client.

Sometimes, there are ample warnings of POA conflict so such misfortunes can be prevented. A financial advisor who sees a client regularly may be able to spot these signs first. "The red flags are if the [person holding] POA suddenly appears," de Graaf says, "wants to take control and is making decisions they had no business making before."

These control issues were evident every time Macdonald had met with her client. "She didn't want her daughter present at our meetings," Macdonald says, "because she felt intimidated by her, and the daughter constantly talked over her mother."

An active, 82-year-old divorcee client of de Graaf who had kept her house and financial affairs in good order, had relied on a neighbour for occasional assistance and enjoyed road trips with friends. This woman then received a sudden visit from her usually absent son, who held the client's POA. He took his mother to see a new doctor, leading the doctor into thinking the client, who was still

managing all her banking and grocery shopping, was showing signs of mental incapacity. The client was then sent to a psychiatric ward, where she was hospitalized for almost two months and deemed mentally incapable.

De Graaf later arranged to move the now traumatized client into a retirement home. The son then made another appearance, this time to sell off the client's home and whisk her back to B.C. with him. The client was then put in a long-term care facility, a significant downgrade from the pleasant retirement home in Ontario she had just settled into. Although de Graaf tried to keep in touch, the client became difficult to reach.

> Granting Children POA

Granting a client's son or daughter POA is often the best choice, but it can have its downside. "There's a guaranteed conflict of interest when the client names the child," says David Christianson, an advisor with Wellington West Total Management Inc. in Winnipeg. "So, you need to get that on the table with your client first. The more [POA-holders] spend on Mom and Dad, the less they inherit."

If your client has more than one child, Poyser and Christianson agree, suggest naming the children as joint holders of POA. This arrangement keeps everyone in check, because multiple POAs are required to disclose transactions to each POA-holder. A contingent, or backup, holder of POA also should be named.

> Financial And Personal Care

There are two general areas covered by a POA: financial or property; and personal care. While many POAs have been issued that grant both types of authority in one document, some provinces have passed legislation to separate the personal-care function from finances. In Alberta and Nova Scotia, for example, a person holding "enduring" POA is responsible for property and financial decisions. Under separate legislation, the Personal Directives Act, the client can assign an "agent" to take care of his or her personal and health-care needs.

Barb Martini, acting director for Alberta's Office of the Public Guardian and Trustee — a division under the Office of the Attorney General that looks after the financial and estate interests of incapable individuals — encourages financial advisors to talk to their clients about assigning both POA and an agent. The agent should be someone who is familiar with the client's medical needs and will establish relationships with the client's regular health-care practitioners.

"All personal-care decisions have a financial context to them," says Martini, who acts as her mother's agent. "You have two people who need to work together for the betterment of the individual, and a check and balance are there."

In provinces in which legislation like the Personal Directives Act is not applicable, clauses for both personal and financial care can be written into the POA document, says Christianson: "This is where a financial advisor can provide substantial extra value by helping clients outline their care specifications. The client needs to visualize a situation in which, down the road, they're not competent and they're not able to communicate their wishes. Try to set the stage for them, and push yourself to have that conversation. Don't just gloss over it and take the easy way out."

Poyser agrees, adding that it is important for your client to express his or her wishes concerning living arrangements. The client, he says, should tell the person holding POA: "Thou shalt continue to spend money out of my asset pool to provide for my approved and better quality of life, even if it dips into my estate."

The POA document could stipulate that your client must stay in a local retirement home and not a long-term care facility, for example. A rogue POA-holder — such as the son in de Graaf's scenario — would then be unable to uproot your client.

> Rein In Your Client's Supporters

If an elderly client is showing signs of mental incapacity and the person holding POA is edging in, you should be aware of whom you can contact on your client's behalf. "That would be the best defence," de Graaf says. "Keep counsellors in place, whether it's the long-standing lawyer, an accountant or a family doctor — someone who has that history. These contacts might also recognize if the client's personality and competency have changed."

Says Stephens: "For financial advisors, the best thing is to know your client, and to know whom your client relies on."

Macdonald's firm requires clients to provide an emergency contact. "If we feel they're ever losing capacity," she says, "or if their behaviour suddenly becomes erratic, then we know who we should contact on their behalf."

That emergency contact could become your legal ally, says Les Hills, a public trustee who works for Alberta's Ministry of Justice. "In Alberta, a family member can bring an application to the court and have the attorney held accountable."

The provincial offices of the PGT can receive complaints and follow up in court if deemed appropriate. A public trustee will ask for temporary guardianship of the client, which terminates the POA, and gain access to the related transactions.

Says de Graaf: "We need to start leaning toward some kind of legislation in which [holders of] POAs need to document everything they're doing and maybe submit it to the PGT for review. But you have to get people who care about the senior and establish the reporting to them. Just knowing that others are watching could keep some of those rogue POAs closer to the straight and narrow."

At this point, says Geller, when lawyers are involved, you have done your job and need to hang back: "My recommendation is: don't get caught in the middle." IE