# WILLS & ESTATES

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R. Trevor Todd is one of the province's most esteemed estate litigation lawyers. He has spent more than 40 years helping the disinherited contest wills and transfers – and win. From his Kerrisdale office, which looks more like an eclectic art gallery than a lawyer's office, Trevor empowers claimants and restores dignity to families across BC. Although his work is renowned, Trevor is not a suit n' tie stuffy lawyer type. He is, in fact, the very opposite. He is an outspoken advocate for the disinherited. He is a world traveller (115 countries and counting) who is approachable, creative, and a fan of pushing buttons, finding needles in haystacks, and doling out advice for free. He is a mentor to young entrepreneurs and an art buff who supports starving artists the world over. He has an eye for talent and a heart for giving back. Trevor is deeply committed to his clients and his craft. He is a Past President of the Trial Lawyers Association of BC, a regular contributor to legal publications, and a sought-after public speaker.

## POWERS OF ATTORNEY

British Columbia's current *Power of Attorney Act* (the "POAA") came into effect on September 1, 2011. It was a substantial improvement over its predecessor statute and essentially codified much of the many decades of common law that existed. This statute affects a large number of people of our population, in particular the aging population who need help managing their financial affairs; consequently, a refresher of its essential terms will be explored in this article.

Most powers of attorney prepared are "enduring". As defined in the POAA, an enduring power of attorney is a power of attorney in which an adult authorizes an attorney to make decisions on behalf of the adult, or do certain things in relation to the adult's financial affairs, and that continues to have effect while, or comes into effect when, the adult is incapable.

A power of attorney may only be used for legal, contractual and financial arrangements and not for health care decisions (which can be provided for with a representation agreement made pursuant to the *Representation Agreement Act*).

A power of attorney should be an essential component of every person's estate planning. It is to be noted a power of attorney is the document you need while you are alive as opposed to a will, which is needed after your death.

## REQUIRED MENTAL CAPACITY

Among the significant changes made by the current POAA over its predecessor was that for the first time it set out a clear test for determining whether an adult is mentally capable of entering into an enduring power of attorney.

Section 12 of the POAA specifies that an adult may make an enduring power of attorney unless the adult is incapable of understanding the nature and consequences of the proposed enduring power of attorney. The adult is incapable of understanding the nature and consequences of the proposed enduring power of attorney if he or she cannot understand all of the following:

A. The property the adult has and its approximate value;
B. The obligations the adult owes to his or her dependents;
C. That the adult's attorney will be able to do on the adult's behalf anything in respect of the adult's financial affairs that the adult could do if capable, except make a will, subject to the conditions and restrictions set out in the enduring power of attorney;
D. That, unless the attorney manages the adult's business and property prudently, their value may decline;
E. That the attorney might misuse the attorney's authority;
F. That the adult can, if capable revoke the enduring power of attorney;
G. Any other prescribed matter.

The legislation also allows for what is known as "springing" powers of attorney, which can be activated by predetermined criteria such as being assessed as mentally incompetent by one or two doctors.

## DUTIES OF THE ATTORNEY

Section 19 of the POAA sets out various duties applicable to a person acting under an enduring power of attorney, as follows:

### Duties of Attorney

19 (1) An attorney must
(a) act honestly and in good faith,
(b) exercise the care, diligence and skill of a reasonably prudent person,
(c) act within the authority given in the enduring power of attorney and under any enactment, and
(d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult.

(2) When managing and making decisions about the adult's financial affairs, an attorney must act in the adult's best interests, taking into account the adult's

current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney.

(3) An attorney must do all of the following:

(a) to the extent reasonable, give priority when managing the adult's financial affairs to meeting the personal care and health care needs of the adult;

(b) unless the enduring power of attorney states otherwise, invest the adult's property only in accordance with the *Trustee Act*;

…

(d) not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties;

(e) to the extent reasonable, keep the adult's personal effects at the disposal of the adult.

(4) An attorney must keep the adult's property separate from his or her own property.

## RECORD KEEPING

The *Power of Attorney Regulation*, B.C. Reg. 20/2011 (the "Regulation") imposes various record-keeping obligations on an attorney acting under an enduring power of attorney.

For example, s. 2(1) of the Regulation requires an attorney make a "reasonable effort" to identify the property and liabilities of the adult who made the power of attorney as of the date on which the attorney first exercised authority on the adult's behalf.

The Regulation also requires the attorney to keep the following: a current list of the adult's property and liabilities (s. 2(2)(a)); accounts and records relating to exercise of the attorney's authority (s 2(2)(b)); and all records necessary to create full accounts of the receipt or disbursement of capital or income on behalf of the adult (s.2(2)(c)).

## COMPENSATION

The *POAA* also deals with the payment and expenses of an attorney. S. 24(1) provides that an attorney must not be compensated for acting as an adult's attorney unless the enduring power of attorney "expressly authorizes the compensation and sets the amount or rate". However, s. 24(2) provides that an attorney may be reimbursed from the adult's property for "reasonable expenses properly incurred" in acting as the attorney.

## TERMINATION

S.30(4) of the POAA lists the circumstances in which an enduring power of attorney will terminate. These include, inter alia, if the adult who made the enduring power of attorney dies (s.30(4)(b)), and if the enduring power of attorney is revoked (s.30(4)(e)).

S.31 of the *POAA* provides that the exercise of authority by an attorney under a terminated power of attorney will be improper unless the attorney "does not know and could not reasonably have known" that the exercise of authority was improper, and the attorney would otherwise have had authority to act if the enduring power of attorney had not been terminated.

## THE ATTORNEY AS A FIDUCIARY

If one person undertakes to act in relation to a particular matter in the interests of another, and has been entrusted with a power of discretion to affect the other's interests, in a legal or practical sense, so that the other is in a position of vulnerability, then a fiduciary duty exists**:** *Williams Lake Indian Band v. Abbey* (1992), 1992 CarswellBC 1067.

In *Sangha (Re),* 2013 BCSC 1965, the Court held that an enduring POA creates a fiduciary relationship between the person making the POA and the attorney:

> [98] It is not disputed that the relationship of a donor and his attorney under an enduring POA is a fiduciary relationship ... As such the attorney in agreeing to the appointment has accepted the obligation to act in the interests of the donor. In *Hospital Products Ltd. v. United States Surgical Corporation,* [1984] H.C.A. 64, 156 C.L.R. 41 (Aust. H.C.), Mason J. stated:
>
> > 68. … The fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is, therefore, one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

Generally, where a power of attorney is granted, a fiduciary relationship exists between the attorney and the donor, although in some circumstances it may be necessary or appropriate to analyze whether the three traditional indicators of a fiduciary relationship are present: *Goyal v. Estate of Maisie Meng*, 2017 BCSC 2474, at para. 11, citing *Egli v. Egli, 2004 BCSC 529*, at paras. 76-79.

The following three indicia of a fiduciary relationship were described in *Frame v. Smith*, [1987] 2 S.C.R. 99:

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise this discretion or power to affect the beneficiary's legal or personal interests; and
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

A fiduciary is subject to a broad duty to act in good faith and in the best interests of the person over whom she exercises discretion or control. She must fully disclose all information relevant to the trust and confidence placed in her, and she must not reap a personal benefit or use the property or goods that she has discretion or power over: *Ast v. Mikolas*, 2010 BCSC 127, at para. 123; *Sangha (Re)* at para. 98

An attorney can only use the power of attorney for his or her own benefit when it is done with the full knowledge and consent of the donor: Egli at paras. 81-82.

*Meng Estate v. Liem*, 2019 BCCA 127, confirmed that a person acting under a power of attorney is an agent held to the standard of conduct to which equity holds a fiduciary.

A claim for breach of fiduciary duty carries with it the stench of dishonesty, if not of deceit, then of constructive fraud: *Nocton v. Lord Ashburton* [1914] A.C. 932 (H.L.).

## STANDARD OF CARE

The standard of care of a fiduciary acting under a power of attorney was described as follows in *Andreasen v. Daniels-Ferrie*, 2001 BCSC 1503, at para. 27:

> . . . in addition to whatever duties may be enunciated on the face of the instrument, even where the attorney acts gratuitously he or she has a duty to account, to exercise reasonable care as would a typically prudent person managing his or her own affairs, and not act contrary to the interests of the donor.

## WHEN SELLING ASSETS

When liquidating estate assets, an attorney has a fiduciary obligation to "obtain fair market value" for the assets being sold, with that value generally being the highest price available in an open and unrestricted market, between informed and prudent parties, acting at arm's length and under no compulsion to act, expressed in terms of money or money's worth. The traditional method of arriving at fair market value is to expose the asset for sale in the market place: *Baer v. Baer*, 2014 CarswellOnt. 10281.

## NOT EVERY BREACH OF DUTY IS A BREACH OF FIDUCIARY DUTY

In *Meng Estate v. Liem* the appeal court overturned a finding of a breach of fiduciary duty by the appellant, the acting attorney, and stated that even though he was in a fiduciary relationship with the opposing parties, not every potential breach of duty is a breach of fiduciary duty. Citing *Girardet v. Crease & Co.* (1987) 11 BCLR (2d) 361, the court found that a fiduciary may breach duties owed in contract or negligence without those breaches being transformed into breaches of fiduciary duty.

At paragraph 35 the appeal court stated as follows: "Typically, a breach of fiduciary duty captures circumstances in which there is a breach of the duty of loyalty owed by the fiduciary and includes circumstances involving acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith, or a variety of similar or related circumstances. This is not an exhaustive list."

But there are criteria for distinguishing a breach of fiduciary duty from negligence by the attorney. The court found that there was no basis in evidence to find that the appellant acted dishonestly or in the face of a conflict of interest, thwarted the wishes of the opposing party, preferred his interests to theirs, or in any way benefited from signing the contract. The court found that he attempted to fulfill his duty of loyalty.

The court further determined that the real complaint was that the attorney failed to exercise the care, diligence and skill of a reasonably prudent person by negligently failing to ascertain, and thereby take into account, the opposing parties' current wishes, resulting in a sale that was not in their best interests because they changed their minds and then disagreed with the price.

The claim was really one of negligence, not of breach of fiduciary duty.

## REVERSE ONUS OF PROOF

The duty of loyalty of a fiduciary is protected through onuses. Fiduciaries are held to an irregularly high standard of behaviour in civil law due to the nature of their duties. It is the peculiarly unequal position of the parties that results in the reversal of onus onto the fiduciary in most fiduciary relationships.

Typically, the reverse onus works as follows: When asserting a breach of fiduciary duty claim, the plaintiff need only establish a prima facie inference of the fiduciary obligations and the breach. The fiduciary concept then imposes a reverse onus that shifts the burden of proof onto the fiduciary to disprove the beneficiaries' allegations.

## CONCLUSION

An enduring power of attorney is an inexpensive and powerful estate planning aid for situations where the donor is physically or mentally unable to attend to his or her legal, financial or contractual matters. The introduction of the revised POAA codified the law relating to the mental capacity required to make an enduring power of attorney, and to the duties of the attorney.