

About Powers of Attorney

POWERS OF ATTORNEY FOR PROPERTY

Authority

The authority of a an attorney is set out in the Power of Attorney document, which may authorize an attorney to take any action that its grantor could have taken, if capable, except make a Will. In exercising powers, the attorney should know that:

1. The Power of Attorney can be revoked so long as the grantor has capacity.
2. An attorney is required by law to carry out duties diligently, honestly, with integrity, in good faith, and in the best interests of the grantor.
3. The attorney should explain to the grantor the powers and duties being carried out and encourage his or her participation in decisions as far as possible.
4. It is the attorney's duty to facilitate contact between the grantor and relatives or friends, and to consult with relatives, friends and other attorneys on behalf of the grantor, subject to any restrictions or conditions the grantor has outlined in the power of attorney document

Duties as Attorney

A general discussion including location of property and documents with a grantor while still capable is helpful to both attorney and grantor.

Initial Responsibilities:

1. An attorney's first step is taking a general inventory of assets and debts, including bonds and stocks; business assets; outstanding accounts; personal belongings; real estate; tax returns; trust or estate interests.
2. The attorney should determine whether the grantor has a Will and the provisions of such Will in order to preserve any property specifically bequeathed in the Will.

More overleaf...

If you want to take a preventative approach to
your legal affairs, please contact me.
I want to help you.

Ongoing Responsibilities:

1. Keeping accounts of all transactions.
2. Making reasonable expenditures reasonably as necessary for the grantor, or grantor's dependants, for support, education and care.
3. Exercise duties with diligence and skill prudently and seek professional advice as questions arise in dealing with the grantor's affairs. An attorney is legally liable for the consequences of any act in breach of his or her duties as attorney.
4. Where it becomes necessary to fulfil the mandate in managing the grantor's property, it is the attorney's right (and duty, under certain circumstances) to make application to the court for directions.

Record keeping

An attorney may, under certain circumstances, be required to formally pass accounts. The requirement can come from the grantor, his or her dependants, the Public Guardian and Trustee, the Children's Lawyer, a judgement creditor, the attorney for personal care, or the courts. Properly kept records, as follows, prepare for this possibility.

1. A comprehensive list of all the grantor's assets from the date of exercising the Power of Attorney
2. A continuous list of all assets acquired or disposed of, complete with dates, amounts, reasons and other relevant details, such as names of individuals conducting transactions, deposit information, interest rates, investment information, liabilities and relevant other calculations
3. A copy of the Continuing Power of Attorney and all relevant court orders. The duration of time to maintain these records is from the date of commencement of acting as Attorney until the authority granted under the Power of Attorney ceases.

Confidentiality

An attorney has a duty of confidentiality and must not disclose any information contained in the grantor's accounts and records, except to the grantor, the grantors' attorney for personal care, pursuant to a court order, or as is consistent with the duties and authority granted, or as requested of the attorney and by the grantor's spouse, or the Public Guardian and Trustee.

Compensation

A Power of Attorney document may or may not provide for compensation. If no mention is made, the attorney can look to the amount currently set out by legislation.

Abuse of Powers of Attorney

Carrying out the duties of an attorney is a fiduciary responsibility. Extreme abuse of that power is a criminal offence. The Criminal Code of Canada provides the following:

Theft by person holding power of attorney

S. 331. Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney.

DUTIES OF ATTORNEYS FOR PERSONAL CARE

In Ontario, Powers of Attorney are subject to the Substitute Decisions Act. Under that Act, and by common law, an attorney has both duties and responsibilities in the personal care of the grantor in the case of loss of mental capacity to make decisions. Stated simply, the attorney's role is to make those decisions in a way that the grantor would have made them and as if the grantor were capable of making them. In so doing, you must follow any restrictions or directions set out in the Power of Attorney.

The information below is given for guidance only and is not an exhaustive list.

When does the Power for Personal Care take effect?

A Power of Personal Care takes effect when the person making it no longer has the mental capacity to look after his or her own personal care.

While a person may be incapable of making decisions in certain areas, they may be capable of making decisions in other areas. For example, a person may not be able to look after their own housing, but may be able to choose their own meals. The exercise of the power of the attorney for personal care can be restricted to those areas in which the person is incapable.

Making the Assessment of Mental Capacity

Review the Power of Attorney document as to details of who will make the assessment of the mental capacity of the grantor. Generally, the document will instruct that the assessment to be made by certain named medical professionals known to the individual.

How decisions are to be made

If more than one attorney has been appointed, the document should state how decisions are to be made; is it sufficient for one or must both decide?

Record keeping

1. Keep records of all decisions made.
2. Maintain comprehensive records: a list of decisions made regarding health care, safety and shelter; keep all medical reports or documents; record names, dates, reasons, consultations and details, including notes of the wishes of the grantor.
3. Give a copy of the records to the grantor, or other attorney or the Public Guardian and Trustee as required.
4. Keep a copy of the Power of Attorney for Personal care and all other court documents relating to the attorney's power of authority.
5. Keep accounts or records until the authority granted under the Power of Attorney for Personal Care ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney is directed by the court to destroy or dispose of records.

Duties

General considerations

The attorney must exercise legal fiduciary duties diligently, honestly, with integrity, in good faith and in the best interests of the grantor while taking into account the grantor's well-being and personal care.

Consultation

The attorney must

1. Explain to the grantor, as well as possible, the duties and powers about to be exercised and encourage him or her to participate in decisions as much as he or she can.
2. Act in accordance with the known wishes or instructions of the grantor and in the best interests of the grantor.
3. Facilitate contact between grantor, relatives and friends.
4. Consult with relatives, friends, and other attorneys on behalf of the grantor.

Personal care

The attorney must

1. Take into consideration all values, beliefs and wishes of the grantor and generally, considerations of quality of life and the benefits of actions taken on behalf of the grantor.
2. Facilitate the grantor's independence.
3. Make decisions that are the least intrusive and restrictive to the grantor.
4. Except where there would be serious harm to the grantor if not used, not use or permit the use of confinement, monitoring devices, physical restraint by use of drugs or otherwise.

Compensation

An Attorney for Personal Care, is not entitled to compensation for health care, residential, social training or support services to the grantor, unless her or she is the grantor's spouse, partner or relative.

Medical care, including "Living Will" instructions

The Health Care Consent Act details requirements as to consent for medical care. There is a hierarchy as to who may give consent for another. Specific instructions in a valid Power of Attorney for Personal Care will generally take priority over this hierarchy.