



439 University Avenue, Suite 1700, Toronto, ON M5G 1Y8
T 416-928-6685 F 416-928-6748

www.ggslawyers.com

THE ROLE OF AN ATTORNEY FOR PROPERTY

Introduction

The purpose of this fact sheet is to explain the important role of an attorney for property. It explains what is involved in being an attorney for property, what the attorney is allowed to do and how the attorney is supposed to meet his or her obligations to an incapable person.

The term “attorney” refers to a person who has been appointed to look after the property of another person pursuant to a continuing power of attorney for property made under the *Substitute Decisions Act, 1992*. “Property” is anything a person owns, including real estate such as a house or a cottage, bank accounts, investments, jewellery and vehicles. Property also includes any money a person is entitled to receive, such as income, damages for a personal injury or an inheritance.

The powers and duties of an attorney for property are set out in the *Substitute Decisions Act, 1992* and case law. **This fact sheet is a summary only.** It is not legal advice, and if you have questions about how to interpret this information, you should consult with a lawyer.

The purpose of a continuing power of attorney for property

Most people manage their own property. However, a person may become mentally incapable of managing his or her property due to an illness or injury. If a person becomes incapable of managing property, no one else has an automatic right to manage his or her property, not even a spouse. This can mean that no one can pay bills, cash cheques, sell property or make other financial decisions for the incapable person.

There are two ways of dealing with this problem. The first way is for a person to plan ahead and make a continuing power of attorney for property while he or she is capable. If a continuing power of attorney for property already exists, the attorney can manage the property during the person's incapacity. An attorney for property can do anything the person could do with his or her property, except make a will.

The transfer of property into joint ownership with another person is not a good substitute for making a continuing power of attorney for property. A person should consult with a lawyer before changing ownership of his other assets.

The second way is through the appointment of a guardian of property. This involves a court proceeding or an application to the Office of the Public Guardian and Trustee. Either is an expensive and time-consuming process, but may be necessary if a person becomes incapable and has no pre-existing continuing power of attorney for property.

The ultimate purpose of a continuing power of attorney for property is to take care of an incapable person. The incapable person depends upon the attorney to ensure that his or her property is protected and properly managed, and used to provide the incapable person with the best quality of life the person can afford. The attorney for property is placed in a position of great trust, and held to the highest standard of conduct.

Getting started

An attorney for property has to know when to start managing the person's property and how to get started.

Most of the time, the person who signs the power of attorney document doesn't want the attorney for property to start managing his or her property right away. Sometimes the power of attorney document will state that it does not take effect until the person has become incapable. More frequently, the power of attorney document says nothing and can be used at any time, but it is understood by the person and the attorney that it will not be used unless the person has become incapable.

Sometimes a third person, such as the lawyer, has been asked to hold on to the power of attorney document until the person becomes incapable.

But how is it decided that the person has become incapable? The law says that a person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. However, in most power of attorney cases, there is no formal process for deciding when the person has become incapable. The attorney for property may rely on a doctor's or capacity assessor's opinion that the person has become incapable, or simply arrive at his or her own opinion. One of the first challenges an attorney may face may be that the person or others do not accept the opinion that the person has become incapable. In some cases, incapacity may have to be decided by the court.

Sometimes an attorney may start helping the person manage his or her property in small ways. Gradually, as time goes by and the person's health deteriorates, the attorney may take on more and more of the job until the attorney is managing all of the person's property. The attorney is accountable for all of his or her actions, even those taken at the direction of the person, and needs to start keeping records and accounts from the very beginning.

When an attorney starts to manage property, ownership remains in the name of the incapable person. For example, the attorney should arrange to have signing authority over the incapable person's bank account, but should not put the account into joint names or the attorney's name. If the attorney receives advice to the contrary, he or she should consult a lawyer.

The attorney must also ensure that everyone who has financial dealings with the person knows that the attorney is now managing his or her property. This may include arranging for bills, financial statements and cheques to be redirected to the attorney.

Legal responsibilities of an attorney for property

The following are some of the major legal responsibilities of an attorney for property:

- The attorney must keep the incapable person's financial accounts and transactions completely separate from the attorney's

- The attorney must never borrow or use the incapable person's money for him or herself or family and friends unless authorized by law

- The attorney must consider the personal comfort or wellbeing of the incapable person in determining whether any financial decision or transaction is for the incapable person's benefit. The attorney's primary goal is to maximize the quality of life of the incapable person

- The following are the expenditures that an attorney for property is required to make on behalf of the incapable person, provided there is enough money, in order of priority:
 1. expenditures that are necessary, within reason, for the support and care of the incapable person;
 2. expenditures for the maintenance and education of the incapable person's dependents, if enough money remains;
 3. expenditures that are necessary to meet the incapable person's legal obligations, if enough money remains.

- The attorney must manage the property in a way that accommodates the decisions made about the incapable person's personal care. Personal care decisions may be made by the person him or herself, or by an attorney for personal care. For example, the person may want to remain living in his or her own house, but may require twenty-four hour care. If the person can

afford the care, it is the attorney's duty to arrange to pay for it. The attorney may make financial decisions that override the personal care decisions only if to do otherwise would result in negative consequences with respect to property that heavily outweigh the personal care benefits of the decision. These negative consequences have to relate to the incapable person. An attorney is not obliged to preserve the incapable person's estate for its eventual inheritance by the person's children or others.

- It is the attorney's duty to try to inform the incapable person of all of his or her powers and duties, to the extent that the person is able to understand
- The attorney for property must encourage the incapable person to participate, to the best of his or her ability, in the attorney's decisions about the property
- The attorney must foster personal contact between family members, caregivers and the incapable person. The attorney must discuss the financial decisions and transactions with family members and friends who are in regular contact with the incapable person and those persons providing personal care to the incapable person, from time to time.
- The attorney must make reasonable efforts to find out if the incapable person has a will, and if so what it says. If the will includes a gift of a specific piece of property, the attorney must retain that property so that it may be passed on in accordance with the will. The attorney can only sell the property if it is absolutely necessary in order to fulfill the attorney's duties to the incapable person during his or her lifetime.

Powers of an attorney for property

Because the attorney for property has serious responsibilities, the attorney is given significant powers with respect to the incapable person's property, to use in fulfillment of these responsibilities.

An attorney for property is allowed to do anything the incapable person could do, if capable, in relation to his or her property, except make a will. For example, the attorney may:

- Open and close bank accounts
- Re-direct pensions and other income
- Deal with investments
- Apply for benefits or supplementary income
- Pay bills
- Buy goods and services
- Collect debts
- Start or defend lawsuits, if there are financial implications
- Lend, sell, store or dispose of personal belongings
- Maintain or sell a house, cottage or vehicle

A person who holds or controls the property of an incapable person is required by law to deliver the property to the attorney for property if requested to do so.

Records and accounts

An attorney for property must keep a record of all transactions involving the incapable person's property. These are described in Ontario Regulation 100/96 and include:

- A list of all of the incapable person's assets as of the date of the first time the attorney makes any transaction on the incapable person's behalf (see Getting Started, above). These include transactions done at the direction of the person or when the attorney is assisting the person. Assets include real estate such as a house or cottage, money in the bank, investments, vehicles, jewellery and other personal property.
- An up-to-date list of all assets acquired and disposed of on behalf of the incapable person. This includes assets bought, sold, loaned or given as a gift. The attorney must include the date and reason for acquiring or disposing of the property and the name of the person from or to whom the asset was bought, sold or given.

- An up-to-date list of all money that the attorney pays out or receives on behalf of the incapable person, including all details associated with the transaction, such as the date, account used, the reason for the transaction and the person or business with whom the attorney carried out the transaction. For example, if the attorney pays a heating bill on behalf of the incapable person, the attorney should record the date, the fact that it was a heating bill, the name of the utility, the amount and the number of the account from which the cheque is written.
- An up-to-date list of all investments made on behalf of the incapable person, including amount, date, interest rate, quantity and type of investment.
- An up-to-date list of all the incapable person's liabilities (debts) as of the date of the attorney's first transaction as attorney.
- An up-to-date list of all liabilities (debts) that the attorney has paid off or taken on, if any, on behalf of the incapable person, including the date, the nature of the liability and the reason for it being discharged or incurred.
- An up-to-date list of all compensation the attorney has taken, including the amount, date and method of calculation and a list of the assets and the value of each asset used to calculate the attorney's management fee, if one is claimed (see Compensation, below).

It is a good idea to keep the original of the power of attorney document in a safe place. A lawyer can provide notarized copies for financial institutions and others. An attorney should not give away the original power of attorney document. An attorney should also keep copies of invoices and bills the attorney has paid on the person's behalf, and cancelled cheques.

Gifts and loans

An attorney for property can make gifts and loans to the incapable person's friends and relatives if the incapable person, while capable,

indicated that he or she would make these gifts or loans. For example, if the incapable person always gave a cash gift to a family member for a birthday, it is appropriate for the attorney to continue this practice, if the incapable person can still afford to do so. However, it would not be appropriate for the attorney to significantly increase the amount of the cash gift, as this is not the practice of the incapable person.

Similarly, an attorney can make charitable gifts if the incapable person previously made similar gifts or authorized these gifts in the power of attorney document. These gifts cannot exceed the lesser of twenty percent of the incapable person's income in the year the gift is made or the maximum amount or value of gifts provided for in the power of attorney document.

If the incapable person indicates that he or she does not want to make gifts or loans for charitable donations, the attorney must follow the incapable person's wishes, regardless of his or her previous wishes or practices.

Professional assistance

It is acceptable and often desirable for an attorney for property to seek advice and assistance from professionals. These can range from tax and accounting services from an accountant to investment advice from a financial adviser to advice from a lawyer.

It is important to seek extra help when it is needed. However, not all professionals understand the unique role of an attorney for property. Before taking action based on advice from a professional, or from staff at a financial institution, an insurance broker or real estate agent, it is a good idea to check with a lawyer to ensure that the action is allowed.

Liability

An attorney for property is liable for damages resulting from a breach of the attorney's duty. However, if the court is satisfied that the attorney who has committed a breach has nevertheless acted honestly, reasonably and diligently, it may relieve the attorney from all or part of the liability.

An attorney who has kept good records that show all the transactions, and how the attorney has made decisions for the incapable person, and who has sought advice from professionals on issues that are beyond the attorney's knowledge or experience, is more likely to be found by a court to have acted honestly, reasonably and diligently.

Court review

An attorney for property may be required to pass (show) the records and accounts to the court for review. The Public Guardian and Trustee may request this, as may the incapable person, the incapable person's guardian or attorney for personal care, any of the incapable person's dependents, a creditor of the incapable person, the Children's Lawyer, or anybody else, with the court's permission. When the court reviews the accounts, it may grant or adjust the attorney's compensation, temporarily suspend or terminate the power of attorney or order that money taken by the attorney be repaid to the incapable person.

An attorney who has not kept the records required by the law is unlikely to successfully pass a review by the court of his or her accounts.

Compensation

Not every attorney for property wants, or is entitled, to be paid for the work involved in looking after the incapable person's property. An attorney for property who wishes to be compensated for managing the incapable person's property is required to exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise. An attorney for property who does not wish to receive compensation is required to exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.

At a minimum, an attorney for property who wishes to take compensation has to have kept proper records, as described above.

The compensation an attorney is allowed to take is regulated by the government and is outlined below:

- 3 % of the value of the capital and income received by the attorney
- 3 % of the value of the capital and income paid by the attorney
- 3/5 of 1 % of the average annual value of the assets (this is called the care and management fee)

This fee scale has been in effect since April 1, 2000.

An attorney who receives assistance in keeping the records and accounts and takes compensation is expected to pay the accounting or bookkeeping fees out of his or her compensation.

An attorney for property should speak with a lawyer for advice on entitlement to compensation and a lawyer or an accountant for advice on how to calculate compensation.

Confidentiality

An attorney for property is not supposed to disclose any information contained in the accounts and records of the incapable person unless required to do so in order to make transactions on the incapable person's behalf or otherwise fulfill his or her duties, or if ordered to do so by the court.

An attorney for property must produce copies of his or her records, upon request, to:

- The incapable person
- The incapable person's attorney for personal care or guardian of the person
- The Public Guardian and Trustee

Assistance from the court

If an attorney for property has questions about the management of the property that he or she cannot resolve, the attorney may apply to the court for directions. Other persons can also apply to the court for directions to an attorney for property, if they have concerns about how the attorney is managing the incapable person's property. The attorney

for property should consult with a lawyer for assistance in bringing or responding to such a court proceeding.

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