

ADMINISTERING POWERS OF ATTORNEY

February 23, 2023

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Agenda

- Overview of Continuing Powers of Attorney for Property (“CPAP”) and Powers of Attorney for Personal Care (“PAPC”)
- When to start acting
- Duties of the attorney for property
- Duties of the attorney for personal care

Powers of Attorney (“POA”)

- A Power of Attorney is a document that appoints a person (the “attorney”) to make certain kinds of decisions on behalf of the person giving the power of attorney (the “grantor”)
- Can be as important as having a Will
 - A Will only governs what will happen on death
 - Planning for illness, disability or incapacity

Powers of Attorney

- Types of Powers of Attorney
 - Powers of Attorney for Property
 - Limited Powers of Attorney for Property
 - Continuing Powers of Attorney for Property
 - Must be at least 18 years old
 - Powers of Attorney for Personal Care
 - Must be at least 16 years old

Limited Power of Attorney for Property ("LPAP")

- Appointment of an attorney to act in a limited capacity, for example:
 - A time-limited appointment to allow the attorney to deal with the grantor's property while the grantor is out of Ontario
- An LPAP can give the attorney the power to manage all of the grantor's property, however, an LPAP is effective only while the grantor has capacity to manage property

Continuing Power of Attorney for Property ("CPAP")

- CPAP continues to be effective on the incapacity of the grantor
- Subject to any restrictions in the CPAP itself, the attorney can do anything with the grantor's property, except make a Will
- Use of multiple CPAPs where there are business interests

Power of Attorney for Personal Care ("PAPC")

- Allows the attorney to make personal care decisions on behalf of a grantor, provided the grantor has lost capacity to make a particular decision
- Authority includes medical treatment decisions and decisions related to activities of daily living.
 - Ability to include statements of wishes regarding personal care

Compensation for Attorneys

- Grantor's discretion on whether to provide compensation and quantum
- Power of Attorney for Personal Care
 - No statute or regulations in Ontario with prescribed fee scale of compensation
 - Court may fix and award compensation
 - Case law – compensation must be reasonable and justified

Compensation for Attorneys

- Power of Attorney for Property
 - Compensation based on formula outlined in Ontario Regulation 26/95
 - 3% on capital and income receipts;
 - 3% on capacity and income disbursements; and
 - Three-fifths of 1% on the annual average value of the assets as a care and management fee
 - Court may also increase or decrease based on review of discretionary factors

When to Act

- **Power of Attorney for Personal Care**
 - Effective when physician or capacity assessor determines that grantor is mentally incapable of decision-making regarding their own healthcare
- **Power of Attorney for Property**
 - Continuing Power of Attorney - Effective when signed, unless the CPAP provides otherwise.
 - Springing Power of Attorney - Effective when physician or capacity assessor determines that grantor is mentally incapable of decision-making regarding their property

When to Act

- **Capacity Assessor**
 - Qualified professional who performs tests to determine if an individual is mentally capable
 - Assessment must be requested by you or someone else
 - Person can refuse assessment (unless court ordered)
- **Notifying third parties and family members of finding of incapacity**

What happens if no POA

- **Guardianship application**
 - Court application process for appointing a substitute decision maker
 - Cost and Delay
 - Management Plan
 - Person applying may not have been the incapable person's choice
- **Office of the Public Guardian and Trustee**

Duties of the Attorney for Property

- Different duties depending on whether the grantor is capable or incapable
- If capable – agency relationship
 - Act on instructions of the grantor
- If incapable – fiduciary

Duties of the Attorney for Property

- Duties change when the grantor loses capacity
- Duties set out in the *Substitute Decisions Act, 1992* (“SDA”)
- Higher level of scrutiny and possibility for conflict

Duties of the Attorney for Property

- Fiduciary
 - Diligently exercise their powers and duties
 - Honesty, integrity, good faith
 - Benefit and best interests of the incapable person

Duties of the Attorney for Property

- Fiduciary duty includes:
 - Duty not to commingle trust funds with the attorney's own property
 - Record keeping and duty to account

Duties of the Attorney for Property

- Fiduciary duty cont'd:
 - Must not profit or put themselves in a position where their interests and duty conflict (unless the PoA permits this)
 - Responsibility to ensure that the management of assets and expenditures are consistent with the terms of the PoA

Duties of the Attorney for Property

- Other duties include:
 - Explain to the incapable person what the attorney's powers and duties are;
 - Encourage the incapable person, to the best of his or her ability, to participate in decisions;
 - Foster regular contact between the incapable person and supportive family members and friends, and consult with those people and with the attorney for personal care;

Duties of the Attorney for Property

- Other duties cont'd:
 - Make reasonable efforts to determine whether the incapable person has a Will and if so what the provisions of that Will are;
 - Must not dispose of property that is subject to a specific gift in the Will (subject to exceptions);
 - Take control of property in the hands of third parties.

Duties of the Attorney for Property

- Required Expenditures – s. 37 of SDA
 - (1) First priority - expenditures that are reasonably necessary for the person's support, education and care;
 - (2) Expenditures that are reasonably necessary for the support, education and care of the person's dependants;
 - (3) Expenditures that are necessary to satisfy the person's other legal obligations.

Duties of the Attorney for Property

- Expenditures – Guiding Principles
 - The value of the property, the accustomed standard of living of the incapable person and his or her dependants and the nature of other legal obligations;

Duties of the Attorney for Property

- Expenditures – Guiding Principles cont'd
 - Expenditures for dependants may be made only if the property is sufficient to provide expenditures for the grantor;
 - Expenditures for other legal obligations may be made only if the property is sufficient to provide for the grantor and the grantor's dependants.

Duties of the Attorney for Property

- Optional Expenditures
 - Gifts and loans to family and friends and gifts to charity
 - Subject to certain rules
 - Check the PoA

Duties of the Attorney for Property

- Gaining familiarity with the grantor's situation, including:
 - Assets
 - Expenditures – current and projected
 - Family
 - Standard of Living

Duties of the Attorney for Personal Care

- Set out in SDA and *Health Care Consent Act, 1996* (“HCCA”)
- Similar to attorneys for property
 - E.g., advising incapable person of duties and powers;
 - Fiduciary;
 - Record keeping;
 - Fostering contact with supportive family members and friends and consulting them;
 - Fostering decision making and independence.

Duties of the Attorney for Personal Care

- In addition, duties include:
 - Choosing the least restrictive and intrusive course of action that is available and is appropriate;
 - Must not use confinement or monitoring devices or restraining the person physically or by drugs (cannot consent to this unless essential to prevent bodily harm);
 - Personal care wishes and “best interests”;

Duties of the Attorney for Personal Care

- **Known Wishes**
 - If the PoA contains specific instructions, attorney for personal care must follow those instructions, and cannot impose their own wishes;
 - If the attorneys knows of a wish or instruction applicable to the circumstances of the incapable person made while a person was capable, must make the decision in accordance with the wish or instruction;

Duties of the Attorney for Personal Care

- Known Wishes cont'd
 - Use reasonable diligence in ascertaining whether there are such wishes or instructions;
 - A later wish or instruction expressed while capable prevails over an earlier wish or instruction.

Duties of the Attorney for Personal Care

- Best Interest
 - If attorney does not know of a wish or instruction, or if it is impossible to make the decision in accordance with the wish or instruction, then the decision must be in the incapable person's "best interest";

Duties of the Attorney for Personal Care

- Best Interest

- Considerations:

- Values and beliefs of the person (known to the attorney);
 - The person's current wishes (if ascertainable);
 - Impact on quality of life – improvement, prevents deterioration, reduces extent of deterioration.
 - Weigh benefit against harm of this decision and other alternatives.
 - Any less restrictive or less intrusive treatments that are as beneficial?

Dealing with family members

- Duty of attorney for property and personal care to consult with:
 - (a) “supportive” family members and friends of the incapable person who are in regular contact with the incapable person, and
 - (b) from those who the incapable person receives personal care
- Consult does not necessarily mean to agree with people being consulted
- Duty to inform of “big” decisions
- Fostering contact with supportive family members and friends

Interplay between CPAP and PAPC

- ss. 32(1.2) and (1.3) of the SDA
- PoA for property has to manage a person's property in a "manner consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions";
- But this does not apply if "the decision's adverse consequences in respect of the person's property significantly outweigh the decision's benefits in respect of the person's personal care".

Tips / Takeaways

- Being an attorney for property or personal care is onerous
- Seek guidance and legal advice before acting
- Become educated about duties and powers under the PoAs
 - <https://www.canage.ca/attorney/>
 - <https://www.publications.gov.on.ca/300633>
- On the estate planning side, properly drafted documents could go a long way

QUESTIONS?

Wilson Vukelich LLP can help ensure that your matters are handled effectively and efficiently, and in manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

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