

Power of Attorney for Property and Personal Care in Ontario

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Overview

- What is a 'Power of Attorney' ?
- POA for Property / POA for Personal Care
- Fiduciary Duties of an Attorney
- Why you should NOT accept an invitation to act as Attorney for an older adult client or resident

Why do people need a Power of Attorney?

- To provide the physical, emotional and financial care for loved ones
- One way in which a person can legally protect their health and their financial interests by planning in advance when they become ill, infirm or incapable of making decision
- A means to minimize family conflict and prevent unnecessary, expensive and avoidable litigation
- To protect vulnerable people from predators



Power of Attorney

- An important legal document which allows a mentally capable adult to provide instructions to another person (the Attorney) on decisions to make if they are no longer mentally capable
- In Ontario there are two documents: a POA for Property and a POA for Personal Care
- We will cover both documents but first, let's have a look at mental capacity

Capacity

- Mental Capacity:
 - The ability to understand information and appreciate the consequences of a certain decision
 - Everyone is presumed to be mentally capable
 - This presumption can be rebutted with medical evidence such as a formal Mental Capacity Assessment

Capacity

- Mental Capacity continued:
 - Decision-specific
 - You can be mentally capable of making some decisions, but not others
 - Capacity can fluctuate
 - You could be mentally capable when you have taken your medication but mentally incapable when you have not; you might be mentally capable to make certain decisions at certain times of the day, but not others when you are tired

Signs of Diminished Mental Capacity



Inability to understand information relevant to making decisions



Inability to initiate or complete necessary tasks



Drastic lifestyle changes (eg. sudden self-neglect)



Changes in hygiene, nutrition, or communication



Disorientation as to time, place, or identity



Impaired thought processes or memory loss



Problems with simple calculations



Perception difficulties, delusions, or hallucinations

Legislation

Substitute Decisions Act

- Outlines legal responsibilities of an Attorney for Property as well as an Attorney for Personal Care

1992

Health Care Consent Act

- Defines the role of an Attorney for Personal Care who acts as a substitute decision maker for medical treatment

1996

Creating a Power of Attorney

- The person who creates a Power of Attorney for themselves is known as the ‘grantor’
- A person can grant powers to more than one Attorney:
 - They can act jointly (making decisions together) or jointly and severally (each has the ability to make decisions on their own)

Types of POAs

General POA (rare)

Allows someone else to make decisions for you while you still have mental capacity, and allows you to agree/disagree with those decisions

Continuing POA (common)

Starts when you create it and remains active once you are no longer mentally capable

Springing POA (common)

Will not come into effect until you become incapable, or otherwise specified

Limited POA

Only active while you still have capacity and limited to specific tasks, such as paying a certain bill

Power of Attorney for Property

- You must be 18 years old and mentally capable to make a Power of Attorney for Property
- As an Attorney, there are important duties that must be followed:
 - Strict separation of financial accounts and transactions
 - The Attorney must pay for (with the grantor's funds): expenses and legal obligations of the grantor

Power of Attorney for Property (cont'd)

- An Attorney must competently manage a grantor's property (finances such as bank accounts and also real estate)
- An Attorney must be aware of their rights and duties to make applications to the court for directions if they need guidance on managing the grantor's property
- An Attorney must also know they have a responsibility to "pass accounts" if requested by the grantor's family, etc.

Power of Attorney for Personal Care

- You must be at least 16 years old and have mental capacity to appoint a POA for Personal Care
- There are certain people who are not allowed to be an Attorney – mainly people who are already paid to provide services to the grantor (unless that person is a family member):
 - The grantor's landlord;
 - Any person who provides care for the grantor in the place where they live;
 - The grantor's social worker, counsellor, teacher;
 - The grantor's doctor, nurse, therapist, or other health care provider;
 - The grantor's homemaker or attendant.

Power of Attorney for Personal Care (cont'd)

- Mental capacity to make a POA for Personal Care:
 - a) the ability to determine (understand) whether or not the proposed Attorney has a genuine concern for the person's welfare, and
 - b) the appreciation that they may need to have an Attorney make the decision for them and what that will mean.

Power of Attorney for Personal Care (cont'd)

Six categories of personal care decisions:

1. **Health and Medical care** – treatment decisions
2. **Shelter** – where you live
3. **Nutrition** – what food you eat
4. **Clothing** – what you wear and how
5. **Safety** – risks that you take or not
6. **Hygiene** – taking care of body and cleanliness

Duties for Personal Care

- Make decisions on the incapable person's behalf in accordance with the SDA, and Health Care Consent Act,
- Where neither Act applies, the Attorney acting under a POA must also have regard to the known wishes or instructions of the incapable person, expressed at a time when the person had capacity.
- An Attorney must use reasonable efforts to act in accordance with the wishes or instructions of the incapable person or otherwise act in his or her best interests. To do this, the Attorney must consider the values and beliefs of the individual in question, current wishes, if ascertainable, general standard in quality of life, and whether the benefit of the decision outweighs the risk of harm to the person from alternate decisions.
- A personal care Attorney is required to keep extensive records of decisions taken, including a comprehensive list of health care, safety, shelter decisions, medical reports or documents, names of persons consulted, dates, reasons for decisions being taken, record of the incapable person's wishes, and so on.

Fiduciary Duties

- The *Substitute Decisions Act* at section 32 (1) addresses the duties of a guardian. It states that an Attorney for Property is:

“a fiduciary whose power and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person’s benefit.”

Fiduciary Duties of an Attorney

- a) must use reasonable care in acting;
- b) must not obtain secret profits;
- c) must account;
- d) must not allow personal interests to conflict with those of the principal;
- e) cannot make, change or revoke a Will on behalf of the donor; and
- f) cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

The Fiduciary Relationship

Typical characteristics of a fiduciary relationship:

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

Fiduciary in Law

- It is an “inflexible rule of the Court of Equity” that a fiduciary must not make a profit or to put himself/herself in a position where his/her interests and his/her duty conflict unless the trust instrument expressly so provides.¹
- As a fiduciary, an attorney for property is not entitled to exercise that for his or her own benefit unless expressly authorized to do so.²

1. *Simone v. Cheifeitz*, [1998] O.J. No. 3267, 74 O.T.C. 18 S.C.J. at para. 47 citing *Bray v. Ford*, [1986] A.C. (51); *Lang v. Landen* [2007] O.J. 3667, [1998] O.J. No. 3267, 74 O.T.C. 189 S.C.J. at para. 47, citing *Bray v. Ford*, [1986] A.C. (51); *Langston v. Landen* [2007] O.J. No. 3667, 160 A.C.W.S. (3d) 921 (S.C.J.) at paras. 30 and 31.

2. *Howlander v. Alamgir*, [2006] O.J. No. 2775, 149 A.C.W.S. (3d) 275 (S.C.J.)

Fiduciary Duty

- The role of an Attorney places an individual in a relationship of **trust**.
- You can think of the level of responsibility necessary here as that of a parent to a child or a doctor to a patient.
- Accountants and financial advisors owe their clients fiduciary duties when handling assets

Invitations to be Appointed Attorney

- There are strong reasons to decline an invitation from an older adult client or resident:
 - The role of an Attorney is serious and requires experience with managing finances and knowledge of the grantor
 - Misuse has serious implications; even defending an allegation can be timely and expensive – requiring you to hire a lawyer

Crossing Professional Boundaries

- Warning Signs:
 - spending extra time with one client beyond his/ her therapeutic needs;
 - disclosing personal information to a specific client;
 - spending off-duty time with a client;
 - ignoring agency policies when working with a client;

OPSWA – Therapeutic Standard

1. Therapeutic Communication:

- i) refraining from discussing his/her personal matters unless it meets a specific, identified therapeutic client need as indicated in the care plan set out by the Registered staff, rather than the PSW's need

<https://opswa.webs.com/Therapeutic%20Relationship%20Standard%20-%202016.pdf>

OPSWA – Therapeutic Standard

3. Maintaining Boundaries:

- a) setting and maintaining the appropriate boundaries within the relationship, and helping clients understand when their requests are beyond the limits of the therapeutic relationship
- h) refraining from engaging in financial transactions unrelated to the provision of care and services with the client or the client's family/ significant other;

Professional Misconduct

College of Nurses of Ontario v Sopha, 2020

- A Registered Nurse and Patient Care Coordinator engaged in a non-therapeutic relationship with an elderly patient
 - The accused purchased the Patient's home and furnishings, managed the Patient's finances and agreed to be appointed as Power of Attorney for Personal Care and Property.
 - **LICENCE SUSPENDED FOR EIGHT MONTHS**

Legal Implications

- Abusing your position of trust as an Attorney is **very serious**
- You could be charged with a criminal offence under the *Criminal Code of Canada*:
 - Theft by person holding Power of Attorney (s 331)
 - Theft over \$5,000 is a maximum of ten years in prison
 - Theft under \$5,000 is a maximum of two years in prison

Criminal Charges – Police Intervention

- Misappropriation of money held under direction (s 332)
- Conversion by Trustee (s 336)
- Fraud (s 280)
- Criminal Negligence (s 219)



Legal Implications – Law Courts

- An Attorney who abuses their trust can also be found liable in a court of law on a civil matter under a claim of undue influence, fraud, or unjust enrichment
 - Undue influence occurs when someone convinces someone to do something for them, against their will
 - Fraud constitutes an intentional act to mislead someone to deprive them of money or assets
 - Unjust enrichment is benefiting at someone else's expense with no legal reason for doing so

What the courts could do

- Order you to be removed as the Attorney
- In some cases, the court will order the Public Guardian and Trustee to step in to appoint a new representative (a relative if available)
- If you have taken money you are not entitled to, the court may order you to repay what you have taken
- “Set Aside” a transfer of Title or Bank Account into joint names

You will need a lawyer



You will need to retain the services of a lawyer to defend you in court



Cost of hiring a lawyer: could be at minimum \$2,000.00 for a retainer



Complex legal issues will cost significantly more

Abuse of trust is a criminal offence

***R v. Taylor*, 2012 ONCA 809**

- Employed caregiver to frail elderly woman becomes POA; uses document to obtain elderly woman's bank card
- Drains account of \$126,000, leaving only \$17,000; new caregiver calls the Police
- **Taylor receives a 21 month prison sentence**

POA Consent

- Power of Attorney documents can still be contested without abuse:
 - The fact of whether or not the grantor had requisite capacity to grant the POA
 - If more than one Attorney is appointed and they are acting jointly and there is a dispute
 - If a family member of the grantor suspects the grantor was unduly influenced in appointing the POA

How to avoid the risk

- Follow agency policies
- Avoid non-therapeutic relationships
- Maintain professional boundaries
- **Do not accept invitations to act as Attorney for Property or Personal Care**



Additional Resources

- Powers of Attorney: <http://welpartners.com/resources/WEL-on-powers-of-attorney.pdf>
- Fiduciary Accounting: <http://welpartners.com/resources/WEL-on-fiduciary-accounting.pdf>
- Elder Law: <http://welpartners.com/resources/WEL-on-elder-law.pdf>
- Advocacy Centre for the Elderly: www.advocacycentreelderly.org
- OBA Elder Section Website: <https://www.oba.org/Sections/Elder-Law>

THANK YOU

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