

Attorney/Guardian/Client Memorandum: Re Property

Guidance for the Attorney for Property appointed under the Continuing Power of Attorney for Property:

The *Substitute Decisions Act*, RSO 1992, is the legislation governing the role, powers, duties and obligations of an attorney for property.

The intent of this memorandum is to provide guidance to assist the attorney/guardian only, it is not intended to replace professional legal advice.

The Continuing Power of Attorney for Property:

Property means that which the grantor owns, including real property, monies in bank accounts, monies on deposit, investments, income, costs awards, or other pecuniary entitlements, GIC's, RRSP's, RIF's , all financial vehicles, personal effects and property, including valuables such as, paintings, vehicles, boats, jewellery, and personal and household effects.

The purpose of a Power of Attorney document, which comes into effect upon execution, is to enable the grantor assistance in the management of their property and financial affairs. The document may be exercised on an agency basis, with direction from the grantor, or without direction, or when the grantor is mentally incapable of property management due to illness, or injury, whether temporary or permanent, an automatic right to take full carriage of the management of the property of the grantor.

The attorney whether acting on direction, or without the direction or involvement of the grantor, is **always** responsible for keeping detailed records and accounts.



An attorney for property can do anything on the grantor's behalf, except make a Will, or arguably testamentary document. In other words, the attorney may make financial arrangements, pay bills, cash cheques, direct payments, sell property and make a multitude of other financial decisions for the incapable person.

The attorney should be careful to make arrangements which are in the best interests of the incapable person. The attorney for property must take care of the incapable person, in all respects, concerning the property and financial management and investment of their affairs. The attorney must take steps to protect, manage and invest the incapable person's property prudently, maximising the benefit to the incapable person.

The attorney for property is a fiduciary, placed in a position of trust, and held accountable to a high standard of ethics and conduct.

The legislation states 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/her property, or is not able to appreciate the reasonably, foreseeable consequences of a decision, or lack of decision.

The attorney is accountable for all actions taken, inclusive of those taken at the direction of the grantor, and therefore must maintain comprehensive and detailed records and accounts from the outset.

An attorney must manage property maintaining ownership with the grantor. Though the attorney may have signing authority over the incapable person's bank account, financial instruments and other financial affairs, the property should not be put into an account in joint names, or under the attorney's name alone.

The attorney should seek legal advice if any of the management matters, duties or obligations, are unclear or not understood fully.

The attorney must also ensure that all relevant persons having financial dealings with the grantor, know that the attorney is managing his/her property.

The legal responsibilities of an attorney for property pursuant to the legislation, and court procedures are to:

“The accounts maintained by an attorney under a continuing power of attorney and a guardian of property shall include,

- a list of all the incapable person's assets as of the date of the first transaction by the attorney or guardian on the incapable person's behalf, including real property, money, securities, investments, motor vehicles and other personal property;

- an ongoing list of assets acquired and disposed of on behalf of the incapable person, including the date of and reason for the acquisition or disposition and from or to whom the asset is acquired or disposed;
- an ongoing list of all money received on behalf of the incapable person, including the amount, date, from whom it was received, the reason for the payment and the particulars of the account into which it was deposited;
- an ongoing list of all money paid out on behalf of the incapable person, including the amount, date, purpose of the payment and to whom it was paid;
- an ongoing list of all investments made on behalf of the incapable person, including the amount, date, interest rate and type of investment purchased or redeemed;
- a list of all the incapable person's liabilities as of the date of the first transaction by the attorney or guardian on the incapable person's behalf;
- an ongoing list of liabilities incurred and discharged on behalf of the incapable person, including the date, nature of and reason for the liability being incurred or discharged;
- an ongoing list of all compensation taken by the attorney or guardian, if any, including the amount, date and method of calculation;
- a list of the assets, and value of each, used to calculate the attorney's or guardian's care and management fee, if any. O. Reg. 100/96, s. 2 (1).

An attorney under a continuing power of attorney and a guardian of property shall also keep, together with the accounts described in subsection (1), a copy of the continuing power of attorney, certificate of statutory guardianship or court order constituting the authority of the attorney or guardian, a copy of the management plan, if any, and a copy of any court orders relating to the attorney's or guardian's authority or to the management of the incapable person's property. O. Reg. 100/96, s. 2 (2).

The records maintained by an attorney under a power of attorney for personal care and a guardian of the person shall include,

- (a) a list of all decisions regarding health care, safety and shelter made on behalf of the incapable person, including the nature of each decision, the reason for it and the date;
- (b) a copy of medical reports or other documents, if any, relating to each decision;
- (c) the names of any persons consulted, including the incapable person, in respect of each decision and the date;

- (d) a description of the incapable person's wishes, if any, relevant to each decision, that he or she expressed when capable and the manner in which they were expressed;
- (e) a description of the incapable person's current wishes, if ascertainable and if they are relevant to the decision;
- (f) for each decision taken, the attorney's or guardian's opinion on each of the factors listed in clause 66 (4) (c) of the Act. O. Reg. 100/96, s. 3 (1).

An attorney under a power of attorney for personal care and a guardian of the person shall also keep a copy of the power of attorney for personal care or court order appointing the attorney or guardian, a copy of the guardianship plan, if any, and a copy of any court orders relating to the attorney's or guardian's authority or the incapable person's care. O. Reg. 100/96, s. 3 (2).

Confidentiality and Disclosure of Accounts and Records:

An attorney or guardian shall not disclose any information contained in the accounts and records except,

- (a) as required by section 5 or permitted by section 6;
- (b) as required by a court order;
- (c) as required otherwise under the Act or any other Act; or
- (d) as is consistent with or related to his or her duties as attorney or guardian. O. Reg. 100/96, s. 4.

An attorney under a continuing power of attorney shall give a copy of the accounts and records he or she keeps in accordance with section 2 to any of the following persons who requests it:

1. The incapable person.
2. The incapable person's attorney for personal care or guardian of the person. O. Reg. 100/96, s. 5 (1).

A guardian of property shall give a copy of the accounts and records he or she keeps in accordance with section 2 to any of the following persons who requests it:

1. The incapable person.

2. The incapable person's attorney for personal care or guardian of the person.
3. If the Public Guardian and Trustee is the guardian of property, the incapable person's spouse, except a spouse from whom the incapable person is living separate and apart within the meaning of the Divorce Act (Canada), or the incapable person's partner, child, parent, brother or sister.
4. The Public Guardian and Trustee, if he or she is not the incapable person's guardian of property or guardian of the person. O. Reg. 100/96, s. 5 (2).

An attorney for personal care shall give a copy of the records he or she keeps in accordance with section 3 to any of the following persons who requests it:

1. The incapable person.
2. The incapable person's attorney under a continuing power of attorney or guardian of property. O. Reg. 100/96, s. 5 (3).

A guardian of the person shall give a copy of the records he or she keeps in accordance with section 3 to any of the following persons who requests it:

1. The incapable person.
2. The incapable person's attorney under a continuing power of attorney or guardian of property.
3. The Public Guardian and Trustee, if he or she is not the incapable person's guardian of property or of the person. O. Reg. 100/96, s. 5 (4).

Retention of Accounts and Records:

Every attorney or guardian shall retain the accounts and records required by this Regulation until he or she ceases to have authority and one of the following occurs:

1. The attorney or guardian obtains a release of liability from a person who has the authority to give the release.
2. Another person has acquired the authority to manage the incapable person's property or make decisions concerning the incapable person's personal care, as the case may be, and the attorney or guardian delivers the accounts or records to that person.
3. The incapable person has died and the attorney or guardian delivers the accounts or records to the incapable person's personal representative.

4. The attorney or guardian is discharged by the court on a passing of accounts under section 42 of the Act and either the time for appealing the decision relating to the discharge has expired with no appeal being taken or an appeal from the decision relating to the discharge is finally disposed of and the attorney or guardian is discharged on the appeal.
5. A court order is obtained directing the attorney or guardian to destroy or otherwise dispose of the accounts or records. O. Reg. 100/96, s. 6 (1).

Subsection (1) applies, with necessary modifications, to former attorneys and guardians. O. Reg. 100/96, s. 6 (2).

In addition, the attorney must consider the personal comfort, best interests, well-being of the incapable person in determining whether any financial decision or transaction is for the incapable person's benefit. The view should always be to maximize the quality of life of the incapable person, and in that regard, liaise with the attorneys for personal care where appropriate and proper to do so.

The attorney therefore must manage the property of the grantor, commensurate with decisions made about the incapable persons/grantor's personal care. Personal care decisions may be made by the person, by the grantor, or by an attorney for personal care, or in consultation with."

AN ATTORNEY FOR PROPERTY MAY BE REQUIRED TO PASS THE RECORDS AND ACCOUNTS FOR COURT REVIEW, WHICH APPLICATION IS GOVERNED BY COURT RULES:

The Ontario Rules of Civil Procedure, Rules 74.15 through 74.18 provide:

"74.15 (1) In addition to a motion under section 9 of the Estates Act, any person who appears to have a financial interest in an estate may move,

Order to Accept or Refuse Appointment

- (a) for an order (Form 74.36) requiring any person to accept or refuse an appointment as an estate trustee with a will;
- (b) for an order (Form 74.37) requiring any person to accept or refuse an appointment as an estate trustee without a will;

Order to Consent or Object to Proposed Appointment

- (c) for an order (Form 74.38) requiring any person to consent or object to a proposed appointment of an estate trustee with or without a will;

Order to File Statement of Assets of the Estate

- (d) for an order (Form 74.39) requiring an estate trustee to file with the court a statement of the nature and value, at the date of death, of each of the assets of the estate to be administered by the estate trustee;

Order for Further Particulars

- (e) after receiving the statement described in clause (d), for an order for further particulars by supplementary affidavit or otherwise as the court directs;

Order to Beneficiary Witness

- (f) for an order (Form 74.40) requiring a beneficiary or the spouse of a beneficiary who witnessed the will or codicil, or who signed the will or codicil for the testator, to satisfy the court that the beneficiary or spouse did not exercise improper or undue influence on the testator;

Order to Former Spouse

- (g) for an order (Form 74.41) requiring a former spouse of the deceased to take part in a determination under subsection 17(2) of the Succession Law Reform Act of the validity of the appointment of the former spouse as estate trustee, a devise or bequest of a beneficial interest to the former spouse or the conferring of a general or special power of appointment on him or her;

Order to Pass Accounts

- (h) for an order (Form 74.42) requiring an estate trustee to pass accounts; and

Order for Other Matters

- (i) for an order providing for any other matter that the court directs.

Notice of Motion

- (2) A motion under subrule (1) may be made without notice, except a motion under clause (1) (e), which requires 10 days notice to the estate trustee.

Service

- (3) An order referred to in subrule (1) and an order for production under section 9 of the Estates Act shall be served by personal service, by an alternative to personal service or as the court directs.

Examination

(4) The court may require any person to be examined under oath for the purpose of deciding a motion under subrule (1).

PASSING OF ESTATE ACCOUNTS

74.16 Rules 74.17 and 74.18 apply to accounts of estate trustees and, with necessary modifications, to accounts of trustees other than estate trustees, persons acting under a power of attorney, guardians of the property of mentally incapable persons, guardians of the property of a minor and persons having similar duties who are directed by the court to prepare accounts relating to their management of assets or money.

FORM OF ACCOUNTS

74.17 (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include,

- (a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets,
- (b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investment, if any, on the date the accounts for the period were opened; (c) an account of all money received, but excluding investment transactions recorded under clause (e);
- (d) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);
- (e) where the estate trustee has made investments, an account setting out,
 - (I) ALL MONEY PAID OUT TO PURCHASE INVESTMENTS,
 - (II) ALL MONEY RECEIVED BY WAY OF REPAYMENTS OR REALIZATION ON THE INVESTMENTS IN WHOLE OR IN PART, AND
 - (III) THE BALANCE OF ALL THE INVESTMENTS IN THE ESTATE AT THE CLOSING DATE OF THE ACCOUNTS;
- (f) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;

(g) a statement of all money and investments in the estate at the closing date of the accounts;

(h) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;

(i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and

(j) such other statements and information as the court requires.

(2) The accounts required by clauses (1) (c), (d) and (e) shall show the balance forward for each account.

(3) Where a will or trust deals separately with capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income.

APPLICATION TO PASS ACCOUNTS

MATERIAL TO BE FILED

74.18 (1) On the application of an estate trustee to pass accounts, the estate trustee shall file,

(a) the estate accounts for the relevant period verified by affidavit of the estate trustee (Form 74.43);

(b) a copy of the certificate of appointment of the applicant as estate trustee;

(c) a copy of the latest judgment, if any, of the court relating to the passing of accounts.

NOTICE OF APPLICATION

(2) On receiving the material referred to in subrule (1), the court shall issue a notice of the application to pass accounts (Form 74,44).

SERVICE

(3) The applicant shall serve the notice of application and a copy of a draft of the judgment sought on each person who has a contingent or vested interest in the estate by regular lettermail.

(3.1) Where the Public Guardian and Trustee or the Children's Lawyer represents a person who has a contingent or vested interest in the estate, the Public Guardian and Trustee or the Children's Lawyer shall be served with the documents referred to in subrules (1) and (3).

(4) Where the person is served in Ontario, the documents shall be served at least 45 days before the hearing date of the application.

(5) Where the person is served outside Ontario, the documents shall be served at least 60 days before the hearing date of the application.

APPOINTMENT OF PERSON TO REPRESENT INTEREST:

(6) Where a person who has a financial interest in an estate is under a disability or is unknown and the Public Guardian and Trustee or Children's Lawyer is not authorized to represent the interest under any Act and there is no guardian or committee or other person to represent the interest on the passing of the accounts, the court may appoint a person for the purpose.

NOTICE OF OBJECTION TO ACCOUNTS

(7) Subject to subrule (8), a person who is served with documents under subrule (4) or (5) and who wishes to object to the accounts shall do so by serving on the estate trustee and filing with proof of service a notice of objection to accounts (Form 74.45), at least 20 days before the hearing date of the application.

(8) Where a person who has a contingent or vested interest in the estate is represented by the Public Guardian and Trustee or Children's Lawyer, the Public Guardian and Trustee or Children's Lawyer, as the case may be, shall serve on the estate trustee and file with proof of service, at least 20 days before the hearing date of the application, a notice of objection to accounts (Form 74.45) or a notice of no objection to accounts (Form 74.46) or a notice of non-participation in passing of accounts (Form 74.46.1).

JUDGMENT ON PASSING OF ACCOUNTS GRANTED WITHOUT HEARING

(9) The court may grant a judgment on passing accounts without a hearing if the estate trustee files with the court, at least 10 days before the hearing date of the application,

(a) a record containing,

(i) an affidavit of service of the documents referred to in subrules (4) and (5),

(ii) the notices of no objection to accounts or notices of non-participation in passing of accounts of the Children's Lawyer and Public Guardian and Trustee, if served,

(iii) an affidavit (Form 74.47) of the applicant or applicant's solicitor stating that a copy of the accounts was provided to each person who was served with the notice of application and requested a copy, that the time for filing notices of objection to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection (Form 74.48) attached to the affidavit,

(iv) requests (Form 74.49) or 74.49.1), if any, for costs of the persons served, and

(v) the certificate of a solicitor stating that all documents required by subclauses (i) to (iv) are included in the record; and

(b) a draft of the judgment sought, in duplicate, and

(c) if the children's Lawyer or the Public Guardian and Trustee was served with the notice of application and did not serve a notice of non-participation in of accounts, a copy of the draft judgment approved by the children's Lawyer or the Public Guardian and Trustee, as the case may be.

(10) Where the court grants judgment without a hearing, the costs awarded shall be assessed in accordance with Tariff C.

REQUEST FOR INCREASED COSTS

(11) Where the estate trustee or a person with a financial interest in the estate seeks costs greater than the amount allowed in Tariff C, the estate trustee or other person shall serve a request for increased costs (Form 74.49.2 or 74.49.3) on every other party to the application and file it, with proof of service.

(11.1) Unless the court orders otherwise, a request for increased costs may be served and filed only during the following period:

1. in the case of an estate trustee, the period beginning 10 days after service of the notice of application is complete and ending 10 days before the hearing date specified in the notice.

2. In the case of a person with a financial interest in the estate, the period beginning 10 days after the notice of application is served on the person and ending 10 days before the hearing date specified in the notice.

HEARING

(11.2) The hearing shall proceed on the date specified in the notice of application if,

(a) a request for increased costs has been filed; or

(b) the court declines to grant judgment without a hearing.

(12) No objection shall be raised at the hearing that was not raised in a notice of objection to accounts, unless the court orders otherwise.

(13) At the hearing the court may assess, or refer to an assessment officer, any bill of costs, account or charge of solicitors employed by the estate trustee.

FORM OF JUDGMENT

(14) The judgment on a passing of accounts shall be in Form 74.50 or 74.51.”

ATTORNEYS DUTIES CONTINUED:

In respect of gifts and loans, and the testamentary intentions of the grantor, the attorney is meant to make decisions commensurate with the capable wishes of the grantor of the attorney for property.

In respect of professional assistance, the attorney for property can seek assistance from professionals including from tax, accounting advisors, as well as advices from a lawyer. It is essential to seek professional assistance when appropriate to do so, because the attorney for property is liable for damages resulting from a breach of the attorney’s duty.

It is intended that the attorney act honestly, reasonably, and diligently, in all circumstances which is the attorney’s protection from any possible liability which may ensue.

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. In that regard, the Substitute Decisions Act sets out a regulation with respect to compensation as follows:

Compensation that Attorneys may be entitled to:

“For the purposes of subsection 40 (1) of the Act, a guardian of property or an attorney under a continuing power of attorney shall be entitled, subject to an increase under subsection 40 (3) of the Act or an adjustment pursuant to a passing of the guardian’s or attorney’s accounts under section 42 of the Act, to compensation of,

(a) 3 per cent on capital and income receipts;

(b) 3 per cent on capital and income disbursements; and

(c) three-fifths of 1 per cent on the annual average value of the assets as a care and management fee. O. Reg. 26/95, s. 1; O. Reg. 159/00, s. 1.

prescribed amount per page The to be paid for photocopies under paragraph 5 of subsection 83 (4) of the Act is 50 cents. O. Reg. 26/95, s. 2.

An application to replace the Public Guardian and Trustee as statutory guardian of property by a person authorized to apply under subsection 17 (1) of the Act shall be in Form 1. O. Reg. 101/96, s. 1.

A management plan required by subsection 17 (3) or clause 70 (1) (b) of the Act shall be in Form 2. O. Reg. 101/96, s. 1.

A guardianship plan required by clause 70 (2) (b) of the Act shall be in Form 3. O. Reg. 101/96, s. 1.

A request for an assessment of one's own or another person's capacity under subsection 16 (1) of the Act shall be in Form 4. O. Reg. 101/96, s. 1.

A statement required by paragraph 1 of subsection 50 (1) of the Act shall be in Form 5. O. Reg. 101/96, s. 1.

A statement in support of an application under subsection 71 (1) of the Act shall be in Form 6. O. Reg. 101/96, s. 1.

A statement in support of a motion under subsection 71 (2) of the Act shall be in Form 7. O. Reg. 101/96, s. 1.

A statement of a person who is not an assessor under section 72 of the Act shall be in Form 8. O. Reg. 101/96, s. 1.

A statement of a person who is not an assessor under section 73 of the Act shall be in Form 9. O. Reg. 101/96, s. 1.

A guardian of property or attorney under a continuing power of attorney may take annual compensation from the property in accordance with the prescribed fee scale. 1992, c. 30, s. 40 (1).

The compensation may be taken monthly, quarterly or annually. 1992, c. 30, s. 40 (2).

The guardian or attorney may take an amount of compensation greater than the prescribed fee scale allows,

(a) in the case where the Public Guardian and Trustee is not the guardian or attorney, if consent in writing is given by the Public Guardian and Trustee and by

the incapable person's guardian of the person or attorney under a power of attorney for personal care, if any; or

(b) in the case where the Public Guardian and Trustee is the guardian or attorney, if the court approves. 1996, c. 2, s. 27.”

Confidentiality:

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

Application for Advice, Opinion and Direction of the Court:

In respect of the court, an attorney for property may from time to time have questions about the management of the property, that he/she deems appropriate for resolution and direction by a court. An attorney may apply to the court for the opinion, direction, and advice of the court, and may consult a lawyer for assistance in doing so.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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