

The Value of a Power of Attorney for Property

Most people understand the necessity of having a will for protecting wealth and ensuring dependants are provided for after death. Fewer people understand the role of Powers of Attorney in an effective estate plan. Powers of Attorney ensure that decisions can be made regarding one's property and personal care while the grantor of the Power of Attorney is alive but incapable of making such decisions.

A person might become incapable of managing his or her property through illness or injury. Typically, when a person becomes incapable, no other person has an automatic right to make decisions concerning the incapable person's property – not even a spouse. This means there will be no ability to manage investments, pay bills, sell property, access a personal bank account, or even cash cheques.

The purpose of a Power of Attorney for Property is to ensure that an incapable person and that person's property are properly cared for. The attorney is in a position of great trust in relation to the incapable person, and is held to the highest standard of conduct. The incapable person relies upon the attorney to ensure his or her property and wealth are protected and managed properly, and to ensure that he or she is provided with the best quality of life possible, given his or her means.

To be valid, a Power of Attorney for Property must be executed while the person is capable. It then authorizes the appointed attorney to manage the person's property during any subsequent incapacity. If a Power of Attorney was not prepared in advance, it may not be done after the person becomes incapable. In such a case, a court application would be required to have someone appointed as guardian to perform that function. This can be expensive and inconvenient, and delays ensuring that the incapable person and his or her property are cared for.

Duties and responsibilities of the attorney

The attorney under a continuing Power of Attorney for Property can do anything the incapable person could do with his or her property if capable, *except* make a will or engage in various types of estate planning, such as changing beneficiary designations on insurance policies or RSPs. The attorney also may not prematurely carry out the provisions of the incapable person's will. It is highly improper to distribute the incapable person's assets as set out in the will (or otherwise) prior to the incapable person's death. Similarly, the attorney may not sell property owned by the incapable person and distribute the proceeds to the beneficiaries named in the incapable person's will, or gift property to the beneficiaries (or others), unless a previous pattern of gifting while the person was capable, or instructions given while capable, can be clearly demonstrated.

These types of transactions are often contemplated (and sometimes carried out) by well-intentioned attorneys as a method of avoiding estate administration tax (commonly known as "probate fees") on the incapable person's death. But any such dealings could amount to a breach of the attorney's duties to the incapable person, with the result that the attorney could be liable to pay damages to the incapable person. In certain situations, loans may be made from the incapable person's property, but again, a previous pattern or intention should be clearly evident. In any event, such actions should be performed with great care to avoid real or perceived conflicts of interest. Any loans should be documented properly, and generally ought to be subject to market rates of interest.

The attorney is required, to the extent possible, to explain to the incapable person his or her powers and duties, and to encourage the incapable person to participate in decision-making. The attorney is required to foster regular personal contact between the incapable person and supportive family and friends, and to consult from time to time with those family members and friends, as well as with the incapable person's attorney for personal care (if different from the attorney for property).

The attorney is required to make expenditures that are necessary for the incapable person's support, education and care. Once those needs are addressed, and if the assets are sufficient, the attorney then must make necessary expenditures for any dependants and other legal obligations of the incapable person. The attorney is required to keep

detailed records of any and all transactions relating to the incapable person's property. The Ontario *Substitute Decisions Act* sets out precisely the types of records that are required.

The attorney must, to the extent possible, manage the incapable person's property in a manner that is consistent with the provisions of the will, and must be careful not to dispose of any property designated to be given to a particular beneficiary under the will. In addition to the duty to the incapable person, the attorney owes a duty to the intended beneficiaries under the incapable person's will. As such, the attorney may be called upon to account to those individuals, and to any other person with an interest or potential interest in the incapable person's estate, such as dependants and other family members.

An attorney under a continuing Power of Attorney for Property may be compensated for the duties performed, in accordance with the provisions of the *Substitute Decisions Act*. However, if compensated, the attorney will be held to a higher standard of care.

A Power of Attorney for Property can be a valuable tool in estate planning. We will be happy to help you understand more about Powers of Attorney and to determine if one is right for you. Contact us for more information. And look for discussion in a future issue of *LegalEase* on the importance of a Power of Attorney for Personal Care.

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Lisa joined SorbaraLaw in September 2007 and now focuses her practice in the areas of wills, estate planning and estate administration.