The Attorney For Property's Job Description: A Short Guide To The Role And Legal Responsibilities Of An Attorney For Property

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Introduction

Although we live in a world of extraordinary medical advances, there is still a very real possibility that you may, as a result of disease or accident, become incapable of managing the every day aspects of your life – paying bills, buying and selling property, buying goods and services and so forth. By making a Power of Attorney for Property you can appoint one or more persons, usually family members, to look after your property in the event of illness, injury, or mental incapacity.

In the event that you become incapable and you have not appointed an attorney for property, your loved ones will have no choice but to commence a lengthy and costly court proceeding to appoint a guardian for you. A Power of Attorney is an invaluable planning tool and the importance of planning ahead cannot be understated. However, a Power of Attorney must be made while you are capable of making these decisions.

The purpose of this article is to explain the role of an Attorney for Property and to outline his or her obligations to the person who appointed them. Pursuant to the *Substitute Decisions Act, 1992* and case law, the Attorney for Property is subject to a variety of duties and responsibilities imposed by statute when dealing with the property of another.

Role and Authority of the Attorney for Property

The role of your Attorney for Property is to step into your shoes and manage your financial affairs and protect your welfare. Unless specific restrictions are put in place, your Attorney for Property will have the freedom to make decisions and take actions concerning your property and financial affairs that you would have, if able. For example, this would include:

- dealing with investments;
- collecting debts;
- paying bills;
- buying goods and services;
- lending, selling, storing or disposing of personal property; and
- maintaining or selling your real property, including a house or cottage.

The Main Duties of the Attorney for Property

An Attorney for Property is considered a fiduciary and therefore has a duty to act diligently, with honesty and integrity, and in good faith. Some of the most important legal responsibilities are discussed below.

Separate Accounting: An attorney has an obligation to keep your financial accounts and transactions completely separate from his or her own. The attorney may never borrow or use your money for themselves unless authorized by law.

Maximize Quality of Life: The most important objective in performing the role of attorney is to maximize your quality of life. As such, the attorney must consider your personal comfort in determining whether and how a financial decision will benefit you.

Required Expenditures: An attorney is required to make certain expenditures, provided there is enough money, in the following order:

1. expenditures that are necessary, within reason, for your support, care and education.
2. expenditures that are necessary, within reason, for the support, maintenance and education of your dependants.
3. expenditures that are necessary to meet your other legal obligations.

In determining the amounts of expenditures, the attorney must consider:

- The value of the property, the accustomed standard of living of you and your dependants, and the nature of other legal obligations must be taken into account.
- Expenditures under paragraph 2 above may be made only if the property is and will remain sufficient to provide for the expenditures under paragraph 1 above.
- Expenditures under paragraph 3 above may be made only if the property is and will remain sufficient to provide for expenditures under paragraphs 1 and 2 above.

Discretionary Expenditures: An attorney may make the following expenditures if there is enough money to first pay all of the required expenditures:

1. gift or loans to your friends and relatives if you (before becoming incapable) indicated that you would make the gifts or loans; and
2. charitable gifts if you made similar gifts before becoming incapable (subject to a maximum amount prescribed by legislation).

Personal Care: Furthermore, the attorney has an obligation to manage your property such that it accommodates decisions made about your personal care and your attorney may only make a financial decision that overrides a personal care decision if to do otherwise would result in negative consequences with respect to your property that heavily outweighs the personal care benefits of the decision.

Participation: It is the attorney's responsibility to encourage you to participate, to the best of your abilities, in decisions about your property.

Consultation: In addition, the attorney must consult from time to time with supportive family and friends, and with those who provide your personal care. The attorney must also seek to foster regular personal contact between you and supportive family members and friends.

Records and Accounts: One of an attorney's main legal duties is to keep accounts of all transactions involving your property. Pursuant to the *Substitute Decisions Act, 1992* a number of people, including your dependants or anyone with the court's permission, may apply to the court for an order requiring the attorney to pass his or her accounts. It is therefore extremely important that the attorney maintain the records and accounts in a manner described below:

The records that the attorney *must* keep include:

- A list of all of your assets as of the date the attorney first made any transaction on your behalf;
- An up-to-date list of all assets acquired and disposed of on your behalf, including the date and the reason for acquiring or disposing of the property and the name of the person from or to whom the asset was acquired or disposed;
- An up-to-date list of all money paid out or received on your behalf including all details associated with the transaction such as the date, reason, etc.
- An up-to-date list of all investments made on your behalf including the amount, date, interest rate and type of investment;
- An up-to-date list of your liabilities as of the date of the attorney's first transaction as attorney; and
- An up-to-date list of all liabilities that the attorney has paid off or taken on, on your behalf, including the date, the nature of the liability and the reason for its being discharged or incurred.

It is also a good idea to keep copies of invoices and bills that have been paid on your behalf and cancelled cheques.

Confidentiality: An attorney is not permitted to disclose any information contained in the accounts and records unless required to do so in order to make a transaction or otherwise fulfill his or her duties, or if ordered by the court. However, the attorney must produce copies of the records upon request to you, your attorney for personal care/guardian of the person and the Public Guardian and Trustee.

Compensation to Attorney For Property

As a general rule, fiduciaries are precluded from financially benefiting from the role. However,

subject to the specific terms of the Power of Attorney, Ontario law gives the attorney the right to receive payment for work done on your behalf and payment is awarded pursuant to a fee schedule set by statute. This schedule determines the amount of compensation that the attorney may take and the method the attorney shall use to calculate the amount. However, an attorney who received assistance in fulfilling his or her duties is expected to pay for those services out of his or her compensation and the attorney is required to maintain, as part of the records, an up-to-date list of all compensation 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 management fee.

Where the attorney is a close family member normally he or she will serve out of natural love and affection and, in such a case, the Power of Attorney document would provide that no compensation be paid to the attorney.

It is important to note that an attorney for property who is compensated for managing your 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. However, an attorney for property who does not 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.

Direction from the Court

If an attorney has any question regarding the management of your property, he or she may apply to the Court for directions on how to resolve the issue and the Court will give directions as to what it considers to be beneficial to you. In addition, other persons may apply to the Court for directions to an Attorney for Property, if they have concerns about the way the attorney is managing your property. Such an application should be brought with the assistance of a lawyer.

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