

WHAT YOU SHOULD KNOW ABOUT

**POWERS OF ATTORNEY FOR
PROPERTY AND FOR
PERSONAL CARE**

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INTRODUCTION

In recent years, powers of attorney have become a great deal more popular amongst the population. A power of attorney is a legal document whereby a person is appointed (called the "attorney") to act on your behalf with respect to your financial matters and property (usually intended only to be acted upon during subsequent incapacity) or your personal care (which can only be acted upon during subsequent incapacity). The person giving a power of attorney is called the "donor".

There are two types of powers of attorney. The most commonly known power of attorney is the power of attorney for the management of one's property. This type of power of attorney has existed for a number of years; however, it has only been since 1978 that a power of attorney would survive subsequent incapacity of the person giving the power of attorney.

The second type of power of attorney is a power of attorney for personal care as contemplated under the new legislation commonly known as the *Substitute Decisions Act*. This legislation came into effect on the 3rd day of April 1995.

It is important that your power of attorney be properly drafted. There are legal considerations that often have to be taken into account when preparing a power of attorney. The omission to take into account some of these considerations may lead to a power of attorney that does not serve your real intentions.

Accordingly, we recommend that you give a great deal of thought to your power of attorney and review this pamphlet carefully in order to properly weigh all considerations.

WHO WILL BE YOUR ATTORNEY?

As a general rule, you should choose a person in whom you have a great deal of trust to act as your attorney. Of course, if you have a great deal of property, your attorney should be a person who has a lot of experience in managing finances and property. Under a general power of attorney for property, the attorney can make all decisions relating to your property and finances with the exception of making a will, or changing beneficiary designations in life insurance policies, RRSP'S, etc. belonging to the donor.

On the other hand, a power of attorney for personal care should appoint an attorney who knows a great deal about you and your preferences with respect to your care and medical attention.

You may appoint more than one person as your attorney. If it is your wish to appoint more than one person as attorney, you should consider whether you wish your attorneys to act jointly or severally. This means that both attorneys can act together or each can act individually.

In the case of a personal care power of attorney, the attorney must be at least sixteen (16) years old and must not be a person who is paid for services rendered to you such as your landlord, a social worker, a teacher, a homemaker, an attendant, a counsellor, an advocate, a doctor, a nurse or a therapist. There is an exception to this rule in the case where your spouse is one of these persons; your spouse may still act as your attorney.

POWERS AND DUTIES OF AN ATTORNEY

Your attorney generally has the power to do everything on your behalf concerning your property and finances except

make a will or change a beneficiary of a life insurance policy. It is possible to restrict your attorney's authority in specific areas. In some cases a person will make a power of attorney for a very specific purpose such as the sale of real estate while that person is away on a trip. With respect to a power of attorney for personal care, your attorney can make decisions regarding a number of issues such as your health, your hygiene, your nutrition, your clothing, your safety, **but only if you are incapable**. We always recommend that you give a great deal of thought to the powers you wish to give your attorney for personal care. We further recommend that you discuss the specific medical interventions you would want in particular circumstances in the event that you lose your capacity, such as the withdrawal of artificial life support systems.

Your attorney for property is obligated to make reasonable expenditures for your support and care as well as the support and care and education of your dependents, and is required to satisfy any legal obligations you may have. The attorney has the duty to act diligently and put your interests ahead of any other interests. The attorney should try to obtain your input into decisions as much as possible and the attorney should maintain contact with your family and friends in order to be in touch with your views and preferences. Your attorney for property must maintain accounts of all transactions incurred on your behalf and can be required to pass the accounts before a judge if called upon to do so.

COMPENSATION

Under the new legislation, your attorney will be entitled to compensation according to a scale set by regulation which from April 3, 1995, was based on 2½% of receipts, 2½% of

disbursements and a management fee of $\frac{2}{5}$ of 1% on the annual average value of the assets as a care and management fee and effective April 1, 2000, was increased to 3% of receipts, 3% of disbursements and a management fee of $\frac{3}{5}$ of 1% on the annual average value of the assets as a care and management fee. If you wish, you may specify in your power of attorney the amount of compensation you wish to pay your attorney. The amount may be higher or lower than the prescribed scale.

CAPACITY TO MAKE A POWER OF ATTORNEY

You must be at least eighteen (18) years old and mentally capable in order to make a power of attorney for property or at least sixteen (16) years old and mentally capable in order to make a power of attorney for personal care.

The test for mental capacity to make a power of attorney for property is as follows:

- (a) You must know what kind of property you own and its approximate value;
- (b) You must be aware of your obligations to your dependents;
- (c) You must know the extent of the powers your attorney will have; and,
- (d) You must be aware that you may revoke your power of attorney at any time provided you are capable.

Provided the proper wording is in your power of attorney for property, your power of attorney for property continues to be in effect if you lose mental capacity. In

order to revoke your power of attorney for property, you must have mental capacity to do so at the time and the revocation must be in writing in the presence of two witnesses.

The test for mental capacity to make a power of attorney for personal care is as follows:

- (a) You must understand whether the attorney has a genuine concern for you; and,
- (b) Appreciate that the attorney may need to make personal care decisions on your behalf.

As you can see this test is far less stringent than the test for mental capacity to make a power of attorney for property. Once again, just like a power of attorney for property you can revoke your power of attorney for personal care provided you have mental capacity to do so at the time and the revocation is in writing in the presence of two witnesses.

SIGNING YOUR POWER OF ATTORNEY

A power of attorney is not valid until properly signed by the donor of the power of attorney in the presence of two witnesses. There are limitations as to who can act as a witness to your signature. The following persons are prohibited from acting as a witness to the signing of your power of attorney:

- (a) Your spouse, your common law spouse or partner;
- (b) The attorney's spouse, common law spouse or partner;
- (c) Your child;

(d) A person under 18 years of age; and,

(e) A person whose property or person whose property is under guardianship.

WHERE THERE IS NO POWER OF ATTORNEY

The law provides for a mechanism to appoint a person known as a guardian in cases where a person becomes mentally incapable without having a continuing power of attorney for property. This involves either an application to the Court or to the Public Guardian and Trustee for the Province of Ontario, depending on the circumstances, usually made by the incapable person's next of kin in order of priority. The guardian of property must:

- (a) File a management plan for property in the prescribed form;
- (b) File a statement that she or he was in personal contact with the incapacitated person during the preceding 12 months and was on good terms with the person;
- (c) Prepare annual financial statements; and,
- (d) Provide security in a form approved by the Public Guardian and Trustee.

As a result, an application to be appointed a statutory guardian of property will likely be a slow process and will definitely be an expensive one as a result of the requirement to provide security, usually in the form of a bond from an insurance company.

If there is no power of attorney for personal care and the person has become incapacitated, the only way to become a

guardian for personal care of that person is by way of a court application. Since a court application is involved the procedure will be lengthy and expensive relative to the costs of having a personal care power of attorney prepared during your legal capacity.

COST OF POWERS OF ATTORNEY

To prepare your power of attorney, for either property or personal care, our law firm charges seventy-five (\$75.00) dollars, plus H.S.T., for a single power of attorney or one hundred and fifty (\$150.00) dollars, plus H.S.T., for couples.

If you require powers of attorney for both property and personal care, our law firm charges one hundred and fifty (\$150.00) dollars, plus H.S.T., for singles and three hundred (\$300.00) dollars, plus H.S.T., for couples.

CONCLUSION

If you require additional information to what is found in this pamphlet, please do not hesitate to raise your questions with your lawyer when meeting with your lawyer. Your lawyer will be happy to answer any questions you may have regarding your power of attorney. As noted above, it is important that you give it a great deal of thought prior to appointing an attorney and in the case of a power of attorney for personal care, we recommend that you discuss this matter with your family physician in order to be aware of the different medical treatments which can be offered to you during your incapacity.

WEBSITE LINKS OF INTEREST

www.attorneygeneral.jus.gov.on.ca/english/family/pgt/