Houser Henry & Syron LLP

FAQ

Power of Attorney

YOU HAVE BEEN ASKED TO ACT AS AN ATTORNEY FOR PROPERTY OR ATTORNEY FOR PERSONAL CARE, WHAT SHOULD YOU KNOW?

If you have agreed to accept an appointment as an attorney for property, you should first find out whether it is a limited or general power of attorney and whether it takes effect immediately or at a future point of time.

A limited power of attorney is one that is limited to specific decisions, property or time period. A general power of attorney gives authority over all of the donor's property to do anything the donor can do, except to make or change the donor's Will. In either case, your authority persists only while the person is mentally capable.

To have authority to act after the person has become mentally incapable, the power of attorney must expressly state that it is a *continuing* power of attorney. Continuing general powers of attorney are most common. A power of attorney can only be revoked while the person has the requisite mental capacity. A continuing power of attorney cannot be revoked after the person becomes mentally incapable.

For both property and personal care, you must also determine whether you are the sole attorney or one of several attorneys. If the power of attorney names multiple attorneys, you must act jointly, unless the document states otherwise.

If you have been appointed an attorney for property, one of the first things you should do upon the power of attorney becoming effective is read the person's Will to make sure that your handling of the person's property is consistent with his or her testamentary objectives. Additionally, you should prepare an inventory of the person's assets and liabilities.

WHEN DOES THE POWER OF ATTORNEY COME INTO EFFECT?

A power of attorney for property will become effective immediately unless the document states otherwise. Most commonly, the power of attorney will become effective when the person becomes incapable of managing his or her own property.

The power of attorney for personal care becomes effective for decisions to which the *Health Care Consent Act, 1996* ("**Consent Act**") applies and authorizes the attorney to make decisions, or in cases where the Consent Act does not apply but the person has become incapable. For clarity, the Consent Act applies to consent to any treatment that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, subject to a few exclusions.

WHEN IS AN ASSESSMENT OF CAPACITY NECESSARY?

If the continuing power of attorney for property stipulates that it will come into effect upon proof of the person's incapacity to managing property, then a capacity assessment is necessary. In these circumstances, the power of attorney may set out the method for determining whether that situation has arisen. Often, it will stipulate that incapacity is to be proven by obtaining written opinions from two qualified medical physicians.

If the document does not provide such a method, then the power of attorney will come into effect in one of the two following ways:

- An designated assessor notifies you that a formal assessment has been performed the person has been found incapable of managing property; or

- You receive notice that a certificate of incapacity has been issued for the person under the *Mental Health Act*.

If you have been granted authority under a power of attorney for personal care, a formal assessment by a designated capacity assessor will not be necessary. This is because this document only comes into effect in two circumstances: (i) for decisions to which the *Consent Act* applies, (ii) for decisions to which the *Consent Act* does not apply, but you have reasonable grounds for believing the person is incapable.

In the first situation the *Consent Act* leaves it up to the health professional who is proposing the treatment to decide if the person is capable of giving consent to the treatment. In the second situation, it is sufficient for you to make a judgement call on reasonable grounds, unless the power of attorney states otherwise.

WHAT IF I DO NOT WANT TO ACT AS AN ATTORNEY?

You may resign from your role as attorney at any time. However, it is easiest if you renounce your appointment from the outset and never act. If you have already acted in your capacity as attorney, then you are required to deliver a copy of the resignation to each of the following:

- The person who granted the power of attorney;
- Any other attorneys under the power of attorney;
- The person named by the power of attorney as a substitute for you, if any; and
- Unless the power of attorney provides otherwise, the person's spouse or partner and the relatives of the person who are known to you and reside in Ontario, if,
    - The power of attorney does not provide for the substitution of another person or the substitute is not able and willing to act, and
    - You believe that the person is incapable of managing property (if the power of attorney is for property)

WHAT ARE MY DUTIES AS AN ATTORNEY FOR PROPERTY?

With respect to the person's property, subject to specific restrictions in the power of attorney, you may do anything that the person would be permitted to do on his or her own behalf, other than change his or her Will or other testamentary dispositions.

More specifically, you *must* do the following:

- Explain matters to the person and encourage his or her participation as much as possible;
- Encourage the person to participate, as far as possible, in your decision making;
- Consult with the attorney for personal care to ensure that your decisions are consistent; and
- Seek to foster regular personal contact between the person and his or her supportive family members and friends.

In addition to the above, you may do any of the following:

- Take physical possession of all of the person's property;
- Subject to any legal limitations on you as an attorney, take such steps in the administration of the estate that will facilitate the expeditious and cost effective settlement of the person's estate consistent with his or her testamentary objectives; and
- Act as the person's litigation guardian in any legal proceeding.

If you are acting *without* compensation, you are expected 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.

If you are acting *with* compensation, you will be held to a higher standard of care, that of a person in the business of managing the property.

WHAT ARE MY DUTIES AS AN ATTORNEY FOR PERSONAL CARE?

With respect to the person's personal care, you may make decisions about his or her health care, nutrition, shelter, clothing, hygiene or safety, and you may give or refuse consent to treatment to which the *Consent Act* applies.

You are expected to make these decisions in accordance with the person's wishes or instructions, if they are known. You must use reasonable diligence to ascertain whether there are any such wishes or instructions. You must at all times keep the person's best interests in mind. In determining what is in his or her best interests, you are expected to consider whether the decision is likely to: improve the quality of the person's life, prevent the quality of his or her life from deteriorating, or reduce the extent to which, or the rate at which, the quality of his or her life is likely to deteriorate.

WHAT RECORDS DO I HAVE TO KEEP?

As an attorney for property, you may be asked to present records of how you have managed the person's assets, called accounts, to the court for approval in a formal proceeding called an application to pass accounts. To ensure you are prepared for this, you should always keep detailed and up to date records of your management of the assets.

There is no equivalent of passing of accounts for attorneys for personal care, but you should nonetheless keep records of your decisions. This includes copies of medical reports, names of the persons consulted, the person's wishes, etc.

AM I ENTITLED TO COMPENSATION? IF SO, HOW MUCH? WHEN IS PAYABLE?

Under the *Substitute Decisions Act 1992*, an attorney for property is entitled to compensation which may be taken monthly, quarterly or annually. The prescribed fee scale is as follows: 3% on capital and income receipts; 3% on capital and income disbursements; and three fifths (3/5ths) of 1% of the annual average value of the assets, as a care and management fee. This is subject to the terms of the power of attorney, which may provide for more or less compensation than the statute.

There is no automatic statutory entitlement to compensation for acting as an attorney for personal care. However, you may apply to court for an order for compensation.

WHEN DOES MY APPOINTMENT END?

You will cease to be an attorney under the following circumstances:

- The person passes away;
- The person revokes the powers of attorney or executes (this can only be done if the person has the requisite mental capacity);
- You pass away or resign; or
- The court appoints a guardian of property or of the person.

CONCLUSION

Powers of attorney are powerful documents which confer tremendous responsibility on you and should not be taken lightly. Failing to carry out your duties properly can be detrimental to the person who granted you the authority, while also causing legal problems for you. If you are appointed as an attorney, it is important that you consult with your legal advisor to ensure that you understand what is expected of you.

ABOUT HOUSER HENRY & SYRON LLP

Your business grows. You expand into new markets, hire new people, move into larger facilities, launch new products or services – and face new legal issues and challenges.

Since 1934, Houser Henry & Syron LLP has provided legal services to private businesses, helping them deal with the complexity that comes with growth and success. We understand the needs of mid-sized businesses and their owners and managers and we have the breadth of expertise and the depth of experience necessary to meet those needs.

For more information, please contact one of the lawyers with our firm. You may also wish to visit our website, www.houserhenry.com, for an overview of our team and our services.

CONTACT US

If you would like more information about this or any area of corporate law, please contact us:

Houser Henry & Syron LLP
Suite 2701, 145 King St. West
Toronto, Ontario
Canada M5H 1J8

t: 416.362.3411 f: 416.362.3757 e: inquiries@houserhenry.com

This publication provides an outline of issues for business professionals to consider. The content should not be taken as legal advice. It is not exhaustive and is subject to change. Please consult with an HHS lawyer for information or advice specific to your situation.

© HHS 2017