

Powers of Attorney

Powers of attorney and advanced care planning: Revocation and alternatives

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(August 6, 2019, 10:42 AM EDT) -- Statistics show many Canadians are living with disabilities and many will have a long-term disability. Coupled with our aging population, there is a serious need for everyone to have properly planned for incapacity. This series of articles discusses legal issues and practical considerations in planning for incapacity using powers of attorney.

Our last article reviewed some important issues involving continuing powers of attorney for property. This third article continues reviewing these matters for property.

Duties of an attorney for property

The Ontario *Substitute Decisions Act, 1992* (SDA) requires an attorney for property to act diligently, with honesty and integrity and in good faith. It is also the attorney's duty to explain his or her powers and duties to the incapable person; to encourage the person to participate in decisions about his or her property; to foster regular personal contact with the incapable person and supportive family members and friends; to consult with those supportive family members and friends; and to keep proper accounts of all transactions involving the incapable person's assets.

Compensation

Unless there is specific provision in the continuing power of attorney for property, an attorney for property is entitled to be paid for services rendered in accordance with a prescribed fee schedule set out under the SDA, and to be reimbursed for all reasonable out-of-pocket expenses. The prescribed fee schedule is: three per cent of receipts, three per cent of disbursements and three-fifths of one per cent of the annual average value of the assets under management. Under the SDA, attorneys for property are also entitled to take their compensation without anyone's consent or a court order, unless the continuing power of attorney provides otherwise, although the court always exercises a supervisory role and may review and order different compensation amounts based on individual circumstances.

The following provides a simple illustration of how compensation is calculated using these percentages:

Mary is incapable of managing her property and her attorney Adam is now managing her property. Last year, Adam oversaw \$50,000 received from Mary's investment and RRIF income which was not reinvested, \$70,000 in disbursements for Mary's expenses, and her total property was worth on average \$4 million (her house is currently valued at \$1.75 million and her investments had an

average value of \$2.25 million for the year).

Adam is entitled to compensation under the SDA in the amount of \$27,600 for last year:

- three per cent of \$50,000 = \$1,500
- Plus three per cent of \$70,000 = \$2,100
- Plus three-fifths of one per cent of \$4 million = \$24,000
- Total: \$27,600

Revocation

You may revoke a continuing power of attorney for property at any time while you are capable. As with granting a continuing power of attorney for property, there are formal requirements to revoke it which must be complied with.

While the SDA seeks to protect the property of incapable persons by ensuring safeguards, it should be appreciated that a continuing power of attorney for property is a powerful grant of authority. It requires, among other matters, careful consideration of the person(s) to whom the power is to be given and the extent of the authority granted. It is advisable to obtain legal advice on making a continuing power of attorney for property, including appropriate ways to minimize the risk of misuse or imprudent use of the authority.

Alternatives

While a continuing power of attorney for property is generally considered the most economical and simple way to deal with decision making when a person is incapable, other alternatives may be appropriate depending on individual circumstances. First, the joint holding of assets is a convenient way to transfer title directly to the surviving joint holder; however, this alternative does not deal with decision making on behalf of the joint holder of property who becomes incapable.

Second, inter-vivos trusts (including alter ego or joint partner trusts for persons age 65 or older) also provide a vehicle for the management of assets, including upon incapacity. Trustees manage assets for the benefit of beneficiaries in accordance with specified terms. At the end of the trust's term, the assets are distributed to the beneficiaries pursuant to the terms of the trust.

The trustee commences managing the trust property when the trust is created — not when the person creating the trust becomes incapable or dies. Accordingly, in the event of incapacity there is already a vehicle (the trust) in place which provides for continuous management. However, trust planning will not cover any assets not held in the trust or decision making for the individual regarding the trust income or capital distributions to or for the incapable person.

This is the third article in a series. Read part one: Powers of attorney and advanced care planning: Disability; and part two: Powers of attorney and advanced care planning: Property.

Our next article in this series will begin reviewing important aspects of, and considerations for, powers of attorney for personal care.

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