

Advising the Attorney

Under the new Legislation

Much has been written about the changes to the Power of Attorney Act. This article is to bring some thoughts to light with respect to the responsibilities of the Attorney, acting under a Power of Attorney under the new legislation. The act can be found at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96370_01

One of the significant changes in the legislation is that Attorney is not obligated to act until he/she actually signs the document. This brings two conflicting points of view to the table. From the Adult's (the person granting the Power of Attorney) perspective: if the Attorney does not sign fairly soon after the document is drafted, and later decides not to sign when the Adult is incapable, it puts the Adult at risk of not having a reliable Attorney appointed at all. Once the Adult is incapable, a new Power of Attorney cannot be drawn because capacity is a key component of making a Power of Attorney. This would mean that someone would have to apply to the Courts to become the Adult's Committee or Guardian, at great expense. The person coming forward may not be the person the Adult would have wanted in the first place. From the Attorney's perspective: It may be that the Attorney doesn't want to sign until he/she is ready to accept the duties, in case, at the time the Adult needs help, he/she is not able to act.

For these reasons, it is of utmost importance to name at least two Attorneys and to ensure that the Adult has obtained a verbal consent from the Attorney that he/she is ready, willing and able to act and to sign the document soon after it is drafted.

Once the document is signed, the Attorney has a positive duty to act when requested, required, or when it becomes prudent to do so;

If the Attorney cannot act when required, he/she must resign in the manner prescribed in Sec. 25; If the Attorney has not signed the document, he/she has no legal obligation to give notice if he cannot act (but it would be prudent to do so in any case).

Once the Attorney begins to act, he/she has a fiduciary responsibility to the Adult and an even higher standard of care is required of a professional Attorney.

If there is a springing clause (triggering event) in the document, it is important for the Attorney to understand the circumstances under which he/she will be required to act;

The Attorney should make inquiries about the Adult's current will and other testamentary documents so that he/she does not inadvertently dispose of a gift in the will or memorandum.

The Attorney is disqualified from acting if he/she is receiving compensation from the adult for personal or health care, unless the Attorney is a spouse, child or parent of the Adult

The Attorney's authority to act ends if the Attorney becomes bankrupt;

The Attorney cannot delegate the authority, except financial management to a qualified financial advisor

When acting the Attorney must:

- Take care of a reasonably prudent person in managing the Adults affairs (a higher standard is required of professionals)
- Keep and produce financial records, including a current list of assets, liabilities, invoices, bank statements and all other pertinent records required to provide a full accounting of receipts, payments, income and capital for the period the Attorney is acting;
- Act in the best interests of the Adult, pursuant to any known beliefs, values and/or instructions set out by the Adult;
- Give priority to the Adult's personal and health care needs;
- Restrict investments to those made in accordance with the Trustee Act, unless the document provides otherwise;
- Not sell or transfer the Adult's property that is subject to a gift in the Adult's will unless the money is required for the Adult's care (the beneficiary may still be entitled to the value of the property from the estate)
- Keep the Adult's property separate (except if the property is owned jointly with the Adult). If the Attorney owns an asset jointly it is or will be important to establish if that ownership was intended to be joint with right of survivorship, or joint with the Attorney as a trustee for the estate.
- Keep the Adult (and other Attorneys) fully informed, to the extent possible, of his/her actions made on the Adult's behalf.

- The Attorney cannot make a new Will for the adult.
- The Attorney must keep the Adult's estate plan in mind when managing the Adult's affairs.
- The Attorney can retain professional services for the adult such as an accountant, a notary, or lawyer
- Unless the Power of Attorney document specifically allows for compensation, the Attorney cannot take a fee for service. The Attorney is entitled to out of pocket expenses and must provide receipts for such expenses.

Yes, it is a big responsibility to accept . We encourage everyone to speak to the proposed Attorney, discuss these issues and then proceed with the preparation of the document. As I mentioned earlier, you don't want to wait until its too late to find out that the person you picked is not up to the challenge!

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