

## A CHECKLIST”

### DUTIES OF AN ATTORNEY UNDER A POWER OF ATTORNEY FOR PROPERTY PURSUANT TO THE SUBSTITUTE DECISIONS ACT, 1992 (the “SDA”)

#### An Attorney MUST...

- Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act*, 1992 (the “SDA”) and the *Health Care Consent Act*, 1996 (the “HCCA”)
- Be 18 years of age
- Rely on the presumption of capacity, unless reasonable grounds exist to conclude a person is incapable of managing property, incapable of understanding information relevant to the management of such property, or is unable to appreciate the reasonably foreseeable consequences of a decision, or lack of decision
- Be aware of the extent of the power of attorney given to the attorney and the circumstances of such power or authority:
  - Is the power a “Continuing” Power of Attorney?
  - Is the power limited to a particular period of incapacity?
  - Is the power to come into effect on a specified date, or event, and correspondingly is such a date or event to be determined in accordance with the Power of Attorney document or the requirements pursuant to the SDA - query the need to obtain a capacity assessment?
  - Is the power to be exercised solely or jointly with another?
- Act in accordance with the Power of Attorney document which may authorize the attorney to take any action that the grantor of the attorney could have taken, if capable, except make a Will
- Determine whether the grantor of the Continuing Power of Attorney has the requisite capacity to grant such a power:



- Is the grantor aware of the scope of property possessed?
  - Is the grantor aware of the approximate value of property possessed?
  - Is the grantor aware of obligations owed to dependants?
  - Is the grantor aware of the conditions and restraints attached to granting a Power of Attorney?
  - Is the grantor aware that an attorney has a duty to account for all actions taken?
  - Is the grantor aware of the power to revoke the Continuing Power of Attorney if capable to do so?
  - Is the grantor appreciative of the risks of entrusting property to the attorney?
- Be aware that the power or authority can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself
- Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing
- Be aware of the statutory obligations of resignation
  - Deliver the resignation to the grantor, the joint or alternate attorneys, spouse/relatives, if applicable
  - Notify persons previously being dealt with on the grantor's behalf
- Be aware that a Power of Attorney terminates upon the death of the grantor
- Be aware of and exercise legal fiduciary duties diligently, honestly, with integrity, in good faith, and in the best interests of the grantor, while also taking into account the grantor's well-being and personal care
- Explain to the grantor its powers and duties and encourage the grantor's participation in decisions
- Facilitate contact between the grantor and relatives or friends
- Consult with relatives, friends and other attorneys on behalf of the grantor
- Keep accounts of all transactions

- Be aware of the standard of care, diligence and skill expected in dealing with the grantor's affairs
  - Ordinary prudence v. Professional prudence
- Be aware of the legal liability assumed for a breach of an attorney's duties
- Determine whether the grantor has a Will and the provisions of such Will in order to preserve any property specifically bequeathed in the Will
- Make expenditures deemed reasonably necessary for the grantor or the grantor's dependants, for support, education and care
- Be aware of the rights and duties to make application to the court for directions if deemed necessary in managing the grantor's property, or for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions
- Be aware of the responsibility to formally pass accounts, if required by the grantor, grantor's dependants, the Public Guardian and Trustee, the Children's Lawyer, a judgment creditor, the attorney for personal care, or pursuant to court order
- Make a comprehensive list of all the grantor's assets from the date of exercising the Power of Attorney
- Keep a continuous list of all assets acquired or disposed of, complete with dates, amounts, reasons and other relevant details, such as names of individuals conducting transactions, deposit information, interest rates, investment information, liabilities and relevant other calculations
- Keep a copy of the Continuing Power of Attorney and all other relevant court orders relating to the attorney's power or authority
- Not disclose information contained in the grantor's accounts and records, except to the grantor, the grantor's attorney for personal care, pursuant to a court order, or as is consistent with the duties and authority granted, or as requested of the attorney and by the grantor's spouse, or the Public Guardian and Trustee
- Keep accounts and records until the authority granted under the Power of Attorney ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney passes the accounts

**There are limits and restrictions for authority of Estate Planning, and gifting by the Attorney. The requirements of S. 32 of the SDA as set out below apply to Attorneys in the same way as to Guardians. These duties must be considered in the exercise of authority:**

- **Duties**

- 32. (1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit;

- **Personal comfort and well-being**

- (1.1) If the guardian's decision will have an effect on the incapable person's personal comfort or well-being, the guardian shall consider that effect in determining whether the decision is for the incapable person's benefit;

- **Personal care**

- (1.2) A guardian shall manage a person's property in a manner consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions;

- **Exception**

- (1.3) Subsection (1.2) does not apply in respect of a decision concerning the person's personal care if the decision's adverse consequences in respect of the person's property significantly outweigh the decision's benefits in respect of the person's personal care;

- **Explanation**

- (2) The guardian shall explain to the incapable person what the guardian's powers and duties are;

- **Participation**

- (3) A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property;

- **Family and friends**

- (4) The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person;

- **Consultation**

- (5) The guardian shall consult from time to time with,

- (a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and

(b) the persons from whom the incapable person receives personal care.

○ **Accounts**

(6) A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property;

○ **Standard of care**

(7) A guardian who does not receive compensation for managing the property shall 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;

○ **Same**

(8) A guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise;

○ **P.G.T.**

(9) Subsection (8) applies to the Public Guardian and Trustee;

○ **Management plan, policies of P.G.T.**

(10) A guardian shall act in accordance with the management plan established for the property, if the guardian is not the Public Guardian and Trustee, or with the policies of the Public Guardian and Trustee, if he or she is the guardian;

○ **Amendment of plan**

(11) If there is a management plan, it may be amended from time to time with the Public Guardian and Trustee's approval;

○ **Application of Trustee Act**

(12) The Trustee Act does not apply to the exercise of a guardian's powers or the performance of a guardian's duties;

○ **Liability of guardian**

33. (1) A guardian of property is liable for damages resulting from a breach of the guardian's duty;

○ **Same**

(2) If the court is satisfied that a guardian of property who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the guardian from all or part of the liability;

○ **Exception, corporate directors**

(3) Subsection (2) does not apply to a guardian acting as a director of a corporation in which the incapable person is a shareholder unless the guardian has acted honestly, reasonably and diligently with a view to the best interests of the corporation;

o **Breach of duty**

- (4) For the purposes of this section, a breach of duty includes a breach of a duty or other obligation by a guardian acting as a director of a corporation, whether arising in equity, at common law or by statute.

**The following further restrictions and limitations should be considered in light of a decade of case law on the subject of Attorney duties, obligations and the authority of the Attorney to conduct Estate Planning on behalf of the Grantor of a Power of Attorney:**

- An Attorney may not change a beneficial designation of life insurance or a “Plan” Why? An instrument is considered testamentary in nature if it is intended that it only come into effect after a person’s death. Therefore a policy of life insurance pursuant to the *Insurance Act* (Ontario, R. S. O. 1990, C.I.8 as amended) and a “Plan” pursuant to the *Succession Law Reform Act*, (R.S.O. 1990, Chapter S.26), are considered testamentary Acts. Note, however, there is an exception to this rule in that an Attorney may possibly continue an appointment under a Plan or insurance designation if switching from one Plan to another but Court approval is recommended for certainty (*Desharnais v. Toronto Dominion Bank 2001 BCSC 1695 (CanLII)*. [2001] B.C.J. [No. 2547]).
- An Attorney may want to protect an incapable person’s assets from a potential spousal claim but in doing so, must not defeat a claim under the *Family Law Act* (*Banton v. Banton, 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176.*).
- An Attorney may complete transactions already entered into by an incapable person.
- An Attorney may take steps for the protection of the lawful dependants of the Grantor (*Drescher v. Drescher Estate (2007), E.T.R (3d) (287) N.S.S.C.*).
- An Attorney may make gifts that the Attorney has reason to believe the Grantor, if capable, would make.
- An Attorney may settle an “*Alter Ego Trust*” similarly certain “Estate Freeze” planning may also be undertaken by an Attorney. Generally speaking, such planning is permitted if it is consistent with the Grantor’s last Will and Testament, or otherwise if the ultimate beneficiary(s) consent and it is in keeping with the terms of the SDA including that there will be no loss suffered by the Grantor. In such circumstances, the Attorney should strongly consider the prospect of obtaining Court approval of any such Estate Freeze or *Alter Ego Trust* planning, particularly if controversies or litigation is expected. Tax considerations must be factored into any planning.

- ❑ Attorney's should always consider in the context of any decision taken obtaining the consent of the Grantor. Consent of the Grantor should be obtained where legal action is taken on behalf of the Grantor.
  
- ❑ An Attorney has the authority to sell, transfer, vote the shares on behalf of the Grantor of a Power of Attorney document; however where the Grantor is also a Director of a corporation, the Attorney does not have the same authority as the Grantor. In other words, the Attorney has no authority to act as Director on behalf of the Grantor. Only where the Grantor is a sole shareholder, or, has consent of all the other shareholders, can the Attorney, in the capacity as shareholder under the Power of Attorney, elect to become a Director and act in that capacity on behalf of the Grantor.
  
- ❑ An Attorney should seek the advice of a tax accountant, or lawyer, when conducting any transaction which involves any sort of estate planning on behalf of the Grantor of a Power of Attorney, particularly in a corporate or succession planning context.

*This checklist is intended for the purposes of providing information and guidance only. This memorandum/checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.*