Role and Responsibilities of an Attorney

Introduction

This fact sheet is based on Part 2 of the Power of Attorney Act of British Columbia as amended September 1, 2011. It deals with the main duties and authorities of an attorney named in an Enduring Power of Attorney. While the following may seem complicated, many of the requirements are not new. They used to be understood as part of the 'common law.' Now they are spelled out in legislation.

The requirements apply to attorneys named in an Enduring Power of Attorney (EPA) whether the document was made before, on, or after September 1, 2011. If you were appointed in an EPA made before September 1, 2011, see the Nidus fact sheet on Amendments and an EPA made before Sept. 1, 2011. (See more information p.3)

Your legal duties are outlined in Section 19 of the Power of Attorney Act. Other sections of the Act spell out an attorney's authorities and any necessary conditions for exercising an authority. You can view the Act at www.bclaws.ca.

You must also read the EPA document itself to see if the adult customized your duties or authorities. The following is a plain language outline of an attorney's role and duties.

Being accountable

An attorney is accountable to the adult. Attorneys may also encounter questions from the Public Guardian and Trustee, Health Authorities or Community Living BC, who have a role to investigate complaints of abuse of adults who are incapable. It is important to know and follow your duties.

Knowing the scope of your authority

The Power of Attorney Act says an EPA covers an adult's financial affairs and "includes an adult's business and property, and the conduct of the adult's legal affairs." Property includes: money, assets such as a vehicle or real estate, and personal effects such as jewellry and clothes.

Exercising the general duties of an attorney

As an attorney, you must act honestly, in good faith and within the law. Generally, you can do anything on behalf of the adult (who appointed you in their EPA) with respect to their legal and financial affairs, except for making or changing the adult's Will, and as long as it is something that the adult could do while considered capable.

Acting in the adult's best interests

Your first legal responsibility as an attorney is to act in the adult's best interests. This means you may make decisions on the adult's behalf, based on your opinion of what is best for them.

When you make decisions about what is in the adult's best interests, you need to take into account the adult's current wishes, their known beliefs and values, and any directions they set out in their EPA document. When it is reasonable to do so, you must also foster the adult's independence and encourage their involvement in decision making, keep their personal effects at their disposal, and give priority to meeting their health and personal care needs.

The Power of Attorney Act recognizes that even as you are required to support the adult's independence and participation and take their wishes and values into account, you may—despite objections the adult makes while incapable—act according to what you believe is best for the management of their financial affairs.

Keeping records

When acting as an attorney on behalf of the adult, you must make a reasonable effort to determine the extent of the adult's property (what they own) and liabilities (what they owe) as of the date you first start acting. This is like taking an inventory.

While you are acting as an attorney, you must keep the following records for the period you are acting:

- A current list of the adult's property and liabilities, including an estimate of their value, if it is reasonable to do so.
- Accounts and other records related to any actions you take as the attorney.
- Invoices, bank statements and other records necessary to create full accounts about receiving or spending capital or income on behalf of the adult.

A journal can help with recording dates, listing the circumstances, people and institutions involved, and noting the decision you made or the action you took.

No delegating your authority

Delegating authority means giving someone else the power to make a decision about the adult's financial affairs. Unless specific wording is provided in the EPA, you cannot delegate any of your decision making authority, except for decisions about investments. See heading on investments.

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Managing investments

Unless the EPA states otherwise, an attorney can only manage the adult's investments according to the Trustee Act. The Trustee Act requires you to invest the adult's monies as an experienced and reliable investor would. This is a high standard.

The exception to the restriction on delegating your authority as an attorney says that, unless the EPA restricts it, an attorney may delegate some or all of their authority for decisions about investments to a qualified investment specialist, including a mutual fund manager, as outlined in Section 15.5 of the Trustee Act. For example, you are responsible for selecting a suitable person, clarifying their authority, and supervising their actions.

Keeping information confidential

An attorney must keep the adult's personal information private, except when necessary to:

- Carry out your duties; or
- Provide information to or comply with a requirement of the Public Guardian and Trustee (a government official); or
- Make an application to court, or comply with a court order.

Changing beneficiary designations

An attorney can manage the adult's beneficiary designations on their behalf. You have this power for all types of instruments—for example, life insurance policies, RRSPs, and RRIFs—except for the adult's Will.

You can renew, convert or replace an instrument that the adult set up while capable, as long as it is similar and you name the same beneficiary the adult named in the original. You may set up a new instrument as long as you make the beneficiary designation the adult's estate. You must apply to court for permission to change who is named as a beneficiary on an instrument the adult made.

Dealing with real estate matters

Unless the EPA document restricts it, an attorney may manage the adult's real estate affairs provided that certain requirements of the Land Title Act are met. The adult and the attorney must each sign the EPA in front of a lawyer or notary public who will also sign the EPA to certify the adult's and attorney's signatures. The adult and attorney do not have to sign at the same time or with the same lawyer or notary public.

Managing the adult's real estate affairs may include buying, selling or mortgaging a house, condominium or recreational property. You have this authority for property the adult owned (is listed on the title) at the time they made the EPA and property they acquire later on—for example, if they inherit it.

When you use an EPA for real estate matters, the Land Title Office will review the EPA to check for proper signing and certification. They will also check whether the adult's name on the EPA matches the name listed on the title of their property. If it does not match, the attorney will have to get documents to prove the adult's identity.

An EPA made in BC may not allow you to manage any real estate or other financial affairs the adult owns in a different province or country. Check with a lawyer or notary public.

Keeping your property and money separate

As an attorney, you must keep the adult's money and other property separate from your own, unless it belonged to you and the adult jointly *before* the EPA is made.

Not disposing of property the adult left to someone in his or her Will

The law says that as an attorney you cannot dispose of (sell, give away, destroy, etc.) any of the adult's property that you *know* is subject to a specific gift in the adult's Will, unless you must do so in order to comply with your other duties as an attorney. It is in the adult's interest to make you aware of specific gifts included in their Will

Using the adult's money for the benefit of others, and making gifts or loans

An attorney's duty is to manage the adult's financial affairs for the adult's benefit. There are some situations where an attorney can use the adult's finances for the benefit of others. For example, you can use the adult's money to fulfill their legal obligation to financially support their minor children.

The Power of Attorney Act spells out the requirements for making gifts or loans on behalf of the adult, including doing things like informally supporting the adult's friends or family members and making charitable donations.

If the adult, while capable, had a pattern of giving gifts or making loans, an attorney may continue this practice as long as there is enough money left to meet the adult's personal and health care needs and those of their dependents, and to satisfy any of the adult's other legal obligations.

The maximum value of the gifts and loans you can make in one year is either 10% of the adult's taxable income for the previous year or $5000, whichever is the smaller amount.

The adult may authorize a larger amount for gifts and loans and may waive the other requirements imposed by the Act, but this must be spelled out in the EPA document.

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An attorney cannot receive any benefit unless the EPA includes a statement to allow this. This applies even if it was the adult's practice to give you money for your birthday or at some other holiday. You can maintain this practice for others (as noted above), but not for yourself unless the EPA says an attorney may receive such a benefit.

Not acting if you are a paid caregiver or an employee of a licensed facility

As of September 1, 2011, an adult cannot *name* you as an attorney or alternate if you are compensated (for example, a paid caregiver) for providing health or personal care services to the adult. You also cannot be named if you are an employee of a facility where the adult lives and receives health or personal care services. There are exceptions in both cases. You may be named if you are the adult's spouse, parent or child.

The Community Care and Assisted Living Act says an owner, operator, employee, contractor or volunteer of a licensed facility cannot *act* as an attorney if named in an EPA made by an adult who is in care. Licensed facility may include extended care in a hospital or a community living agency. There is an exception if the attorney is the adult's spouse, parent or child. If you act when you are not allowed, the adult's EPA is cancelled.

Rights of an Attorney

Accessing information

An attorney has the right to the same information and records the adult has a right to – for example, to his or her bank statements – as long as these relate to the attorney's area of authority, or to the adult and his or her incapability. See below for more information.

Receiving delivery of the adult's property

An attorney will need to know about and have control of the adult's financial affairs for which they are responsible. The Power of Attorney Act says that anyone who has custody or control of property belonging to an adult must deliver the property promptly—if requested by the adult's attorney—to the attorney.

The attorney may not be entitled to receive the adult's Will. The adult may have given instructions to a lawyer or notary public or included instructions in their Will that it must not be delivered to the attorney.

Being paid for out-of-pocket expenses

You have a right to be refunded for reasonable expenses resulting from carrying out your duties, as an attorney. You should document all expense claims and payments.

The Power of Attorney Act says an attorney cannot be paid a fee for acting as an attorney unless it is spelled out in the EPA document.

Getting help and advice

As an attorney, you can ask for and hire help and advice to carry out your responsibilities. For example, you might need the advice of an accountant to help file the adult's taxes. This is different from delegating decision making power.

You may also apply to the BC Supreme Court for direction on the scope of your authority.

Resigning from your role

You may resign as an attorney. The law sets out specific procedures you must follow; see below for more information.

Being protected from liability

An attorney may not be liable (legally responsible) for any loss or damage to the adult's financial affairs, as long as you follow your duties as an attorney and any specific requirements stated in the adult's EPA.

You cannot do anything that is illegal or fail to do anything that is legally required, nor can you be expected to do things the adult asks you to do that are impossible or unreasonable.

For more information go to www.nidus.ca

>> Information—EPA—Resources

- Amendments and Enduring Powers of Attorney made before September 1, 2011
- Access to Information and Enduring Powers of Attorney
- Resigning as an Attorney or Alternate
- Lifespan of an Enduring Power of Attorney

>> Information—Representation Agreement

- Overview Fact Sheet

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