

Helpful Legal Information for MAHCP Members

Duties of an Agent Acting Under a Power of Attorney

by Jacob Giesbrecht
of Inkster Christie Hughes, LLP



Jacob Giesbrecht
Inkster Christie Hughes, LLP

Because of the positions as highly trained, intelligent professionals working the medical field, members of the Manitoba Association of Health Care professionals are often asked by friends and family members to act as representatives during periods of incapacity or vulnerability. As discussed in a previous article in this newsletter, there are three distinct offices that one may undertake on behalf of another. They are: (1) executors or trustees under a will; (2) agents under a power of attorney document; and (3) proxies under a living will or health care directive. The topic of this article is to describe some of the affects of a power of attorney and the responsibilities inherent in the position.

A power of attorney is an inexpensive and effective estate planning tool that can save money and unnecessary inconvenience in the future. A power of attorney is a legal document by which the maker (donor) grants authority to another person (attorney) to manage some or all of the donor's financial affairs. A power of attorney is only effective during the donor's life, terminating upon death. A power of attorney does not provide the authority for the attorney to make health care decisions for the maker.

An enduring power of attorney allows a person to plan for the day when she can't manage her financial affairs due to mental incapacity. The document allows someone to manage the donor's financial affairs when the donor is incapable of doing so.

A Committee vs. Power of Attorney

In the absence of an enduring power of attorney the financial affairs of an incompetent person may be frozen. In such circumstances to allow for the management of the estate of the incompetent person someone would have to apply to the court to be named Committee of the estate of the incompetent person.

A Committee is a person authorised by a court order to manage the financial affairs of a person declared to be incompetent. There are disadvantages to having to apply to become Committee:

- Someone has to apply. There is a statutorily created hierarchy which establishes priority to act as Committee, based on kinship to the incompetent person.
- The applicant must be a resident of Manitoba.
- There is a fee payable for the Court application, which is presently \$160.00.
- The Manitoba Public Trustee is required to review the application, and if there is reason to oppose the application will intervene on behalf of the incompetent person. There is a \$100.00 fee payable to the Public Trustee to review the application, whether or not it opposes the application.
- The application requires the opinion of 2 medical practitioners attesting to the person's condition and recommending the court appointment of a Committee. Doctors may charge a fee for such medical reports, the cost of which can range from \$50.00 to \$400.00 or more per report.
- A lawyer's expertise may be required to prepare the application and attend court at the hearing of the application. Legal fees of thousands of dollars may be incurred depending on the complexity of the application and whether or not the application is contested.
- Persons with an equal or prior right to that of the applicant to act as Committee must be served with the application and its supporting materials and be given an opportunity to challenge the application.
- The process to be appointed Committee may take months, during which time the

assets of the incompetent person may be inaccessible.

- The applicant may be required to post a personal bond or an insurance bond and may be required to obtain sureties to guarantee the due performance of his or her duties as committee.
- After an appointment a Committee must file an inventory with the court and thereafter periodically appear before the court to have accounts approved.
- A Committee's management of the estate and entitlement to compensation are supervised by the court.

All of the disadvantages of a committee application can be avoided through the use of an enduring power of attorney, by which the attorney is granted the authority to administer the donor's estate during a period of incompetence.



Choosing the Attorney

The choice of attorney should not be taken lightly. The person selected may be required to assume control of all of the financial affairs of the donor. Some considerations when choosing the proper person(s) to act, include:

- Select an attorney that is trustworthy and a competent financial manager;
- Although an attorney need not be resident of Manitoba or even Canada, it is convenient to name an attorney that lives nearby;
- Its possible to select more than one person to act as attorney but this may raise issues of additional time complexity in the administration of the person's affairs.
- Attorney must be 18 years of age and cannot be a mentally incompetent

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Duties of the Attorney

The attorney is required to represent the interests of donor and there is a duty not to conflict with that role. The assets of the donor cannot be used for the benefit of anyone other than the donor, except for purposes of maintaining dependants of the donor. The attorney cannot make gifts from the assets of the donor, even where the donor has made gifts in the past, unless the power of attorney provides for specific gifts. The attorney should not personally borrow from nor lend money to the donor's estate, unless specifically authorised to do so.

Once having acted or agreed to act, an attorney must continue to act once the attorney knows or ought reasonably to have known that the donor is mentally incompetent. The duty to act does not exist for an attorney that was unaware of the appointment, did not agree to act or where the donor remains competent.

The general duties for an attorney include:

- maintaining money in a separate account;
- collecting and arranging for safekeeping of documents;
- ensuring safety of property;
- maintaining real property through insurance, proper repair and upkeep and payment of taxes and other associated expenses;
- applying for money the donor is entitled to receive including CPP, EI, pension benefits, etc.;
- completing tax returns and ensuring payment of taxes;
- cancelling charge accounts;
- collecting monies owing to the donor;
- paying debts of the donor; and
- investing money of the donor.

An attorney will be accountable for his or her administration of the property of the donor. An attorney must separate the donor's assets from his/her own and maintain proper records of the management of the estate of the donor. The donor can name someone in the Power of Attorney to whom the attorney must periodically account, failing which the attorney is required to account annually to the donor's nearest relative, or, if there are no relatives, to the Public Trustee of Manitoba.

Although there is no specific form of accounting required, the attorney should ensure completeness of records that will allow for reconciliation of the income received and expenses paid on account of the donor.

Revoking a Power of Attorney

A power of attorney can be revoked by the donor at any time during competency. It may terminate by intervention of the Public trustee if a doctor attending upon a person is unaware the person has a power of attorney and declares the person incompetent, or if concerns about the attorney arise.

The Public Trustee will investigate the circumstances with a view to the best interests of the donor and his or her estate.

Termination will also occur if:

- the court appoints someone to act as Committee;
- the donor dies or becomes bankrupt;
- the attorney becomes bankrupt, incompetent or dies; or
- it is terminated by a court.

The duties of an attorney are quite onerous and should not be entered into lightly. The key to successfully undertaking these duties is to act with a view to the interests of the donor, keep careful records and deal with all of the issues of the donor as they arise.

As you know, Inkster Christie Hughes LLP offers a legal assistance program to the members of MAHCP. Under this plan you receive reduced rates on a number of specific legal matters such as the purchase or sale of a home, Wills, Powers of Attorney, Health Care Directives, separation agreements, divorces as well as a reduction on general legal rates.

This paper is intended as an introduction to the topic and not as legal advice. If you require specific advice with respect to your situation, you should contact a lawyer.

This series of articles will continue in future editions of the MAHCP News. If there is a topic that you would be interested in, please contact Wendy at 772-0425.