

DUTIES OF DECISION MAKERS ACTING UNDER ENDURING POWER OF ATTORNEYS AND PERSONAL DIRECTIVES

FALL 2011

Enduring Power of Attorneys and Personal Directives are becoming increasingly important documents - and we strongly recommend that our clients prepare such documents to ensure that a decision maker is appointed in the event that our client becomes incapable of making (or communicating) reasonable decisions. However, the persons appointed as decision makers under such documents must fully understand the scope of their authority, the duties inherent in the role, and the manner in which they are to make decisions for the Donor or Maker.

DUTIES OF AN ATTORNEY ACTING UNDER AN ENDURING POWER OF ATTORNEY

An Enduring Power of Attorney authorizes the Attorney to act on the Donor's behalf with respect to the Donor's property and financial affairs. The Enduring Power of Attorney does not authorize the Attorney to make personal care or health care decisions, or any other non-financial decisions, on the Donor's behalf. If the Enduring Power of Attorney does not specifically restrict the Attorney's authority to make decisions concerning the Donor's property and financial affairs, the Attorney has very wide powers to deal with the Donor's property for the Donor's benefit. The Attorney has a duty of "utmost loyalty" to the Donor - and the Donor alone. The Attorney has no legal authority to deal with the Donor's property for anyone else's benefit (unless specifically authorized to do so in the Enduring Power of Attorney), with the narrow exception of the maintenance, education, benefit and advancement of the Donor's spouse, adult interdependent partner and dependent children. It is not relevant that the Donor may have provided financial assistance or monetary gifts to another person prior to losing capacity. The Attorney's sole obligation is to make financial decisions and deal with the Donor's property for the Donor's benefit only, unless the Enduring Power of Attorney specifically provides otherwise.

It is often the case that the Attorney is also a beneficiary under the Donor's Will. This circumstance does not entitle the Attorney to take an "advance" on her/his bequest, or to

otherwise deal with the Donor's assets for the Attorney's benefit (even if the Attorney believes that she/he will eventually be receiving the asset in any event). An Attorney cannot under any circumstances benefit personally in carrying out his/her functions as Attorney. Every decision an Attorney makes that affects the Donor's finances and assets must benefit the Donor - and must not be made for the benefit of any other person, including the Attorney. Therefore, an Attorney cannot borrow from the Donor's assets, co-mingle the Donor's property with the Attorney's own property, purchase the Donor's property, nor sell or lease the Attorney's assets to the Donor.

Further, unless the Enduring Power of Attorney specifically states otherwise, the Attorney must act gratuitously. That is, the Attorney cannot seek or take compensation for acting as Attorney. Although, an Attorney is entitled to be reimbursed for out-of-pocket expenses paid in executing his or her duties as an Attorney (e.g., parking costs for an attendance at the bank).

The Attorney has a duty to invest the Donor's funds. However, there is legislation restricting an Attorney's investment authority; therefore, an Attorney should obtain professional advice before making investment decisions in respect of the Donor's property. An Attorney must keep a detailed written record of all transactions involving the acquisition or disposition of the Donor's property. An Attorney must always be ready to produce her/his accounts as at any time an "interested person" (which means nearly anyone) can make an application to the Court to have the Court examine those financial records and to evaluate the performance of the Attorney's duties.

Acting as an Attorney is a serious obligation, and the law seeks to protect the vulnerable person on whose behalf the Attorney acts. Therefore, the law imposes personal liability on an Attorney: that is, an Attorney can be held personally liable to the full extent of the Attorney's personal assets for any loss incurred as a result of the negligent performance of his or her duties as Attorney.

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DUTIES OF AN AGENT ACTING UNDER A PERSONAL DIRECTIVE

An Attorney acting under an Enduring Power of Attorney must make the decision that he or she believes is in the Donor's best interests. By contrast, an Agent acting under a Personal Directive, must, if there are no express instructions, make the decision that the Agent believes the Maker would have made in the circumstances, given the knowledge of the Maker's wishes, beliefs, and values. The Agent must follow any clear instructions in the Personal Directive, even where the Maker's express instructions are not necessarily in the Maker's best interests (for example, if the Personal Directive expressly instructs the Agent to refuse a transfusion of whole blood). The Agent also has a duty to consult with the Maker of the Personal Directive before making a decision under the Personal Directive. An Agent is also not entitled to receive any payment for exercising his or her authority under a Personal Directive – unless the Personal Directive expressly states otherwise.

Importantly, an Agent must keep a record of all personal decisions made under the Personal Directive and keep that record for at least 2 years after the Agent's authority ceases, and must be ready to produce this record on request.

An Agent does not have the authority to make decisions on the Maker's behalf in respect of psychosurgery, sterilization that is not medically necessary, the removal of tissue for implantation in the body of another person or for medical education or research purposes, or participation in research/experimental activities if it offers little or no potential benefit to the Maker.

Acting as an Attorney or Agent is a solemn responsibility that attracts legal obligations and liability. Therefore, where Attorneys or Agents are uncertain whether a particular activity is outside their authority or in breach of their duties, they should contact a lawyer for advice to ensure compliance with the relevant legislation. Our lawyers have expertise and experience in such matters and can assist Attorneys and Agents in ensuring that they reasonably discharge their duties. ▲

DISCLAIMER

This article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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