

Duties of an Attorney When There is a Power of Attorney

Powers of Attorney are important written documents which can only be used while the Grantor (the person who gives or "grants" the Power of Attorney at issue) is alive. In Ontario, there are two types of Powers of Attorney: 1) A Power of Attorney for Property, and 2) a Power of Attorney for Personal Care. All Attorneys and Grantors should be aware that Powers of Attorney can be revoked as long as the Grantor is still mentally capable of doing so, and a revoked Power of Attorney is no longer effective.

Power of Attorney for Property

Note – Most Powers of Attorney for Property are continuing (sometimes referred to as "enduring" in other provinces), in that they are effective while the Grantor is mentally capable of managing his/her property and they continue to be effective if the Grantor later becomes mentally incapable of managing his/her property. If a Power of Attorney for Property is not continuing, then it will not be effective if the Grantor later becomes mentally incapable.

Unless the Power of Attorney for Property contains restrictions or conditions, an Attorney for Property generally has the power to do on the Grantor's behalf anything in respect of the Grantor's property that the Grantor could do if he or she were mentally capable, except make a Will. In some instances, an Attorney for Property also cannot change beneficiary designations or declarations for certain assets, like RRSPs, RRIFs, TFSA's and life insurance policies.

If two or more Attorneys are appointed "jointly" (as opposed to "jointly and severally"), they must work together to make decisions on the Grantor's behalf. This applies for Personal Care too.

The Attorney for Property must act diligently on the Grantor's behalf, with honesty and integrity. The Attorney for Property must act reasonably, in good faith, and in the Grantor's best interests. The Attorney for Property must also keep detailed accounts setting out exactly what he or she has done with the Grantor's property.

Before giving a Power of Attorney for Property, the Grantor needs to understand that unless the Attorney for Property manages the Grantor's property prudently its value may decline. The Grantor must also appreciate the possibility that the Attorney for Property could misuse the authority given to him or her (e.g. the Attorney for Property may steal property). *It must be noted that abuse of a Power of Attorney for Property can be a criminal offence. The best defence for a Grantor is to only appoint someone he or she trusts as Attorney for Property.*

The Attorney for Property must explain to the Grantor what he or she has done with the Grantor's property, and encourage the Grantor to participate, to the best of Grantor's abilities, in decisions about the Grantor's property. This means that the Attorney for Property must speak with the Grantor and take his/her answers into account.

The following expenditures from the Grantor's property are permitted:

- The expenditures that are reasonably necessary for the [Grantor]'s support, education and care;
- The expenditures that are reasonably necessary for the support, education and care of the [Grantor]'s dependants [e.g. a spouse and minor children]; and
- The expenditures that are necessary to satisfy the [Grantor]'s other legal obligations.

Certain optional expenditures (e.g. gifts or loans to the Grantor's friends and relatives, charitable gifts) may be permissible; however, advance discussion with a lawyer is advisable as this often depends on the Grantor's financial situation. In general, an Attorney for Property should not use a Power of Attorney of Property to "pre-take" a potential future inheritance.

The Attorney for Property should review the Grantor's Will (if any) to see if any property is subject to a special gift or instructions under the Grantor's Will. Legal advice should be sought before doing anything with property subject to a special gift or instructions under the Grantor's Will.

Unless the document provides otherwise, the Attorney for Property can be entitled to compensation for his or her services to the Grantor, but he or she must be able to show all work performed on the Grantor's behalf. However, an Attorney for Property who takes compensation can be held to a higher standard with respect to liability, etc..

The Attorney for Property must consider the Grantor's personal comfort and well-being, and must co-ordinate with the Grantor's Attorney(s) for Personal Care (if different people) with respect to decisions also affecting the Grantor's personal care (e.g. where the Grantor lives).

The Attorney for Property must seek to foster regular contact between the Grantor and “supportive family members and friends” and must consult with them from time to time, but the Attorney for Property is not necessarily required to follow the advice or requests of such family members and friends. An Attorney for Property who fails to act and/or acts improperly can be removed.

Third parties who hold the Grantor’s property generally need to follow the instructions of the Attorney for Property unless the Attorney for Property’s authority has been revoked and/or otherwise removed.

Power of Attorney for Personal Care

Note - A Power of Attorney for Personal Care can only be used if the Grantor is mentally incapable of making personal care decisions for him- or herself. “Personal Care” includes health care, nutrition (i.e. what the Grantor eats or otherwise consumes), shelter (i.e. where the Grantor lives), clothing, hygiene and safety decisions.

Typically a Power of Attorney for Personal Care will authorize the named Attorney(s) for Personal Care to give consent, or to refuse to give consent, to treatment to which the *Health Care Consent Act* applies.

If the Grantor has expressed wishes with respect to his/her personal care (e.g. wishes regarding terminating life-sustaining procedures in certain conditions), then the Attorney for Personal Care is generally required to follow those wishes, if the wishes are known to him or her and if following those wishes is possible.

If the Grantor has not expressed wishes with respect to his/her personal care, then the Attorney for Personal Care is generally required to make a decision in accordance with the Grantor’s “best interests.” In determining “best interests,” the Attorney for Personal Care must consider:

- the values and beliefs that the [Attorney] knows the [Grantor] held when capable and believes the [Grantor] would still act on if capable;
- the [Grantor]’s current wishes, if they can be ascertained; and
- the following factors:
 - Whether the [Attorney]’s decision is likely to,
 - improve the quality of the [Grantor]’s life,
 - prevent the quality of the [Grantor]’s life from deteriorating, or
 - reduce the extent to which, or the rate at which, the quality of the [Grantor]’s life is likely to deteriorate.
 - Whether the benefit the [Grantor] is expected to obtain from the decision outweighs the risk of harm to the [Grantor] from an alternative decision

In general, the Attorney for Personal Care should choose the least restrictive and intrusive course of action that is available and appropriate. The Attorney for Personal Care must act diligently on the Grantor’s behalf, with honesty and integrity, and must act reasonably and in good faith.

Like the Attorney for Property, the Attorney for Personal Care must explain his or her decisions to the Grantor, foster the Grantor’s independence (if possible), and encourage the Grantor to participate, to the best of his or her abilities, in decisions about his or her own personal care.

The Attorney for Personal Care is not in charge of the Grantor’s property (unless he or she is also named as an Attorney for Property), so the Attorney for Personal Care must co-ordinate with the Grantor’s Attorney(s) for Property with respect to personal care decisions which also involve the Grantor’s property (e.g. where the Grantor lives, paying for nursing care).

The Attorney for Personal Care must seek to foster regular contact between the Grantor and “supportive family members and friends” and must consult with them from time to time, but the Attorney for Personal Care is not necessarily required to follow the advice or requests of family members and friends. Like with Property, an Attorney for Personal Care who fails to act and/or acts improperly can be removed.

As of September 2026, an Attorney for Personal Care cannot apply for and/or consent to Medical Assistance in Dying (“MAID”) on behalf of the Grantor. The Grantor must be capable of applying for and consenting to MAID on his/her own behalf through the MAID process. “Advance directives” re: MAID are not currently effective, although this may change in the future.