Enduring Powers of Attorney – The Duty to Account and An Attorney's Right to Compensation

CBA-NS Wills, Estates and Trusts Mid-Winter Meeting January 2013

Richard Niedermayer
Stewart McKelvey

This paper addresses various issues relating to the duty of an attorney to account and to receive compensation pursuant to an enduring power of attorney for management of property and financial affairs (an "enduring POA"). This is not intended to be a comprehensive paper on these subjects, but should serve to identify a few aspects of the law in this area.

STATUTORY FRAMEWORK

Powers of Attorney Act, R.S.N.S. 1989 c. 352. (the "Act")

> Application of Act
>
> 2. This Act applies to a power of attorney to the extent that the power of attorney authorizes the management of the estate of the grantor.
>
> Enduring power of attorney
>
> 3. A power of attorney, signed by the grantor and witnessed by a person who is not the attorney or the spouse of the attorney, that contains a provision expressly stating that it may be exercised during any legal incapacity of the grantor, is
>
> (a) an enduring power of attorney;
>
> (b) not terminated or invalidated by reason only of legal incapacity that would, but for this Act, terminate or invalidate the power of attorney; and
>
> (c) valid and effectual,
>
> **subject to any conditions and restrictions contained therein that are not inconsistent with this Act.**
>
> Powers and duties
>
> 5(1) Where a grantor of an enduring power of attorney becomes legally incapacitated, a judge of the Trial Division of the Supreme Court may for cause, on application,

> **(a) require the attorney to have accounts passed for any transaction involving the exercise of the power during the incapacity of the grantor;**
>
> (b) require the attorney to attend to show cause for the attorney's failure to do anything that the Attorney is required to do as attorney or any order made pursuant to this Act;
>
> (c) substitute another person for the attorney;
>
> **(d) allow or disallow all or any part of the remuneration claimed by the attorney;**
>
> (e) grant such relief as the judge considers appropriate;
>
> (f) make such provision respecting costs as the judge considers appropriate.
>
> 5(2) Where an attorney is ordered to have accounts passed, the attorney shall submit the accounts for approval to the Court or, where a judge of the Court so orders, to the Public Trustee at such intervals as the judge may order and, when approved, the attorney shall file the accounts with the prothonotary of the Supreme Court for the county where the application is heard.
>
> ...
>
> 5(4) Nothing in this Section prevents an attorney from submitting account to the Public Trustee for approval and the Public Trustee shall consider accounts when submitted by an attorney.
>
> 5(5) Nothing in this Section prevents a grantor from applying for an accounting by the attorney, if the grantor has the legal capacity to do so.
>
> *[Emphasis added]*

NATURE OF AN ENDURING POA

An enduring POA is a delegation of authority by one person (the grantor) to another person (the attorney) and provides the attorney with authority to manage the grantor's property and financial affairs. If the requirements of Section 3 of the Act are met, the power of attorney is an enduring POA. This provides the attorney the ability to continue to make decisions about the grantor's property and affairs if the grantor loses the capacity to do so on his or her own behalf.

Is an attorney appointed under an enduring POA a trustee? Not in the strict sense in that title to the grantor's assets is not transferred to the attorney as trustee for the benefit of the grantor as beneficiary. However, an enduring POA creates a fiduciary relationship between the grantor and the attorney. This relationship is heightened once the grantor becomes mentally

incompetent as the grantor is then completely reliant on the attorney acting on his or her own behalf to manage the grantor's property and financial affairs in his or her best interest.

The attorney is imposed with numerous duties by virtue of the nature of the appointment. These duties include the obligations:

1. to act within the scope of the power;
2. to exercise reasonable care and skill;
3. not to delegate their authority unless expressly authorized by the grantor;
4. to avoid conflicts;
5. to act in the best interests of the grantor; and
6. not to profit from the grantor's property.

In Nova Scotia, the general authority that can be granted to an attorney by a grantor must be considered in light of Section 3 of the Act which permits "conditions and restrictions" in the power that are "not inconsistent with this Act".

DUTY TO ACCOUNT

In dealing with this issue, I will briefly look at the duty to account in three scenarios: while the grantor is alive and competent, while the grantor is alive and incompetent, and after the death of the grantor.

(a) While the grantor is alive and competent

The attorney can always be compelled by the grantor to account for the attorney's actions while the grantor is alive and competent. If the attorney does not voluntarily provide the accounting, the grantor can apply to Court for an order requiring the accounting (subsection 5(5) of the Act).

In acting under an enduring POA, an attorney has an ongoing duty to keep accounts and to produce them if requested. In *Leung Estate v. Leung*, [2001] O.J. No. 2171 (S.C.J.) ("*Leung*"), it was noted that the duty to keep accounts is an ongoing obligation and should not be considered an imposition on the attorney if he or she has failed in that duty over a long period of time. In *Harris v. Rudolph*, [2004] O.J. No. 2754 (S.C.J.) it was held that following the grant of an enduring POA, the attorney has a duty to account for all

transactions which he or she undertakes for the grantor. Justice Valin held that this is due to the fact that the attorney is the one with the information. The court agreed with the decision in *Leung*, where it was found that there is a duty on the attorney to keep accounts and to be ready upon request to produce those accounts.

(b) While the grantor is incapacitated but alive

Paragraph 5(1)(a) of the Act permits the Court to order an attorney to pass accounts during the incapacity of the grantor on application and for cause once the grantor is legally incapacitated. This provision has several elements to it.

(i) Who can make the application?

Any interested party can make the application for accounting under the Act. Generally this would include a grantor's spouse, children, the substitute attorney or other beneficiaries of the grantor's estate. In *Burns v. Burns*, 2002 NSSC 145 ("*Burns*"), the applicant was the son of the grantor and a former grantee of a previous enduring POA. In *Wright v. Cournoyer*, 2003 NSSC 92 ("*Wright*"), five plaintiff children of the grantor were seeking a detailed accounting from their sister who was the grantee of an enduring POA from their mother. (See also *B.F.H. v. D.D.H*., 2010 NSSC 340 for a discussion on standing to bring an application for accounting.)

(ii) When is the grantor "legally incapacitated"?

In order to determine if a person has become legally incapacitated for the purpose of triggering the starting date for an accounting, one must first look to the enduring POA itself to see if the grantor has stated an event, date, or any other reason that would delay the effective date of the enduring POA (i.e. a "springing power"). If the document does not state how incapacity is to be determined, the court will accept evidence and form its own opinion.

In *Wright*, Justice Edwards relied on evidence provided by the family doctor, the grantee of the enduring POA (the daughter), and an acquaintance of the grantor. The court concluded that the grantor displayed no signs of mental incompetence. In this case it appears that the most weight was given to the family doctor's testimony and evidence. The Act does not require a doctor to ascertain that the grantor is incapacitated, but jurisprudence indicates that evidence coming from a neutral health practitioner is highly probative.

(iii) Cause under the Act

In order for the court to compel an attorney to pass accounts, Section 5(1) of the Act requires that there be "cause". What constitutes cause is not defined in the legislation, and therefore one must turn to jurisprudence to define this pre-requisite.

A review of the authorities shows that courts do not rely on one specific test. Rather, they look at different factors that can constitute a justifiable cause. Two factors given considerable weight by courts are:

> (1) Are there reasonable concerns regarding the management of the grantor's assets?
>
> (2) What is the nature and the extent of the information previously provided by the attorney to the applicant, if any?

In *Burns*, Justice LeBlanc refused to grant an order for accounting based on the fact that the information previously provided to the applicant was, in his opinion, sufficient to demonstrate how the assets had been dealt with.

(iv) Is the inability to produce the accounts a defence to the attorney?

An attorney may argue that he or she does not have records of all transactions, but this is not a defence. As set out in *Leung*, the attorney has a duty to keep accounts and to be prepared to produce these records upon request. This should not be considered an imposition on the attorney if he or she has failed in that duty.

Sharp v. Palmer's Estate (1987) N.S.R. (2d) 38 (C.A.) ("*Sharp*"), dealt with a situation where the approval of accounts was challenged. Ms. Sharp was her mother's guardian under the Nova Scotia *Incompetent Persons Act*, a comparable position to an attorney under an enduring POA. The court found that she conducted herself in an open and forthright manner with no intention to deceive, and allowed her to be compensated as guardian. Despite this fact, the Nova Scotia Court of Appeal upheld a decision ordering Ms. Sharp to reimburse the estate for two large cash withdrawals that were unaccounted for.

(v) Transactions occurring before the grantor becomes incapacitated

Under s. 5(1)(a), an application by an interested party for the attorney to account is limited to the period of incapacitation of the grantor. Section 5(1)(e) provides that a judge may **"**grant such relief as the judge considers appropriate" and does not include any limitation on the time period to be considered in making such an order. In *B.F.H. v D.D.H.*, 2010 NSSC 340, the grantor signed an enduring power of attorney in favour of her daughter, the respondent. The respondent subsequently signed several cheques to herself, which she claimed to be gifts given by her mother before she was incapacitated. When the grantor's house was sold, the solicitor suggested some of the proceeds be given to the respondent and the grantor's son, the applicant, as an advance on their inheritance. The applicant opposed this, but the respondent took the advance and signed a promissory note to the grantor which was payable on demand. A proportional reduction in the respondent's inheritance if the promissory note was not paid out would occur. The respondent gave a voluntary passing of accounts to the applicant. The applicant asked for restitution and the records were submitted to the Court. The Court reviewed the impugned transactions and concluded one of the cheques was a valid inter vivos gift, but three others were not. Additionally, the advance from the proceeds of the sale of the home was held to be inappropriate. The Court ordered disgorgement of all but the valid *inter vivos* gift.

(c) When the grantor is deceased

The duty to account does not end when the grantor dies. The duty is owed to "the maker, or to his personal representative after death" (Howlett, *Estate Matters in Atlantic Canada*, at page 403). The same considerations as to the date of incapacity, the appropriate applicant and whether cause exists as discussed above apply here.

What can be done to improve on the statutory regime in Nova Scotia? One simple suggestion is to include specific provisions in the power of attorney itself which would require the attorney to submit accounts to a third party who acts as a "monitor" or "protector". This concept is enshrined in the legislative provisions of some other jurisdictions, particularly British Columbia. The person appointed to this role under the document could be the person who will act as executor of the estate or, if the attorney is also the executor, the principal beneficiary or beneficiaries of the estate. The document can also provide for a replacement monitor or

protector in the event the original named person dies or becomes incompetent. While this requirement will likely necessitate increased time and energy by the attorney to provide an appropriate account (and potential additional expense if professionals are engaged to prepare the accounts), it does bring with it additional control. A middle ground might be to simply include a requirement that the attorney shall account only when requested by the monitor or protector rather than require the attorney to automatically do so on a regular or periodic basis.

Another option for an attorney to use when that attorney wishes to have accounts passed in order to justify his or her activities is to submit accounts to the Public Trustee for approval pursuant to subsection 5(4) of the Act. Presumably this provision is complementary to section 37 of the *Public Trustee Act* which permits a "trustee or guardian" to have accounts settled. If the section does apply, the *Public Trustee Act* provides that "the Public Trustee may settle and approve such accounts, award such remuneration and give such discharges to the same extent and effect as the court or judge as authorized to do by the *Trustee Act* and the Civil Procedure Rules". Further, the appointment itself could require the attorney to submit accounts to the Public Trustee rather than to a monitor or protector. However, I understand these options are not being pursued in practice.

AN ATTORNEY'S RIGHT TO COMPENSATION

As an agent of the grantor, an attorney is not automatically entitled to compensation unless the enduring POA contains an express term providing for compensation or such a term can be implied from the terms of the contract of agency. Often, family members act gratuitously under enduring POAs, although trust companies and other non-family professionals will generally require an agreement for compensation before acting.

If the enduring POA contains an express provision providing for compensation based on a percentage of the grantor's assets, time spent at an agreed hourly rate or some other basis for compensation, the amount to be paid to the attorney will be easily calculated. In my experience, trust companies who accept an appointment as attorney for property and financial affairs will always require a fee agreement be put in place. These agreements are similar to agreements for executor services but are customized to the attorney role. They are signed by the grantor prior to signing the power of attorney and incorporated by reference into the document much like with a will.

The much more interesting question is whether attorneys under enduring POAs where there are no compensation provisions specified are entitled to remuneration and, if so, on what basis?

On the one hand, there is a general rule that any person who is subject to a fiduciary duty should not take any secret remuneration or unauthorized financial benefit. Accordingly, it would follow that an attorney has no right to charge for services except where the instrument appointing him expressly allows compensation, where there is a legally binding fee agreement with the grantor or where the Court has authorized him to do so. This latter avenue is always open to an attorney who acts during the legal incapacity of the grantor (see paragraph 5(1)(d) of the Act).

As noted above, an enduring POA is a contract of agency and not a trustee arrangement. Trustees obtain compensation because of the provisions of the *Trustee Act*. However, that Act does not strictly apply to attorneys as they are not acting as trustees *per se*.

From an agency law perspective, no compensation is payable to an agent unless such a right is expressed or implied or the agent has a right or restitution in *quantum meruit* (*Bowstead and Reynolds on Agency* (16th ed.) 1996). The Court will generally apply a term that an agent is entitled to reasonable remuneration (page 275). However, that must be implied from the terms of the contract of agency (page 276). While fiduciaries (including agents) cannot charge for services without the informed consent of the principal (page 278), *quantum meruit* covers cases where there are incontrovertible benefits to the principal (page 279).

It is a question of construction in each case whether it was the party's intention that the agent should work gratuitously or whether an agreement to remunerate was implied into the relationship. Resort can be had to trade usage and custom in this regard (see *Fridman's Law of Agency* (7th ed.) 1996, at page 189).

With an enduring POA which is general in nature, arguably some form of reasonable compensation for the attorney to conduct matters on behalf of the grantor is implied. Further, attorneys will arguably have a claim in *quantum meruit* for time spent on the grantor's behalf which had incontrovertible benefits to the grantor. Typically this would be based on a "time and effort" basis. The amount of that compensation on a *quantum meruit* basis could be assessed based on time spent, the complexity of the grantor's affairs, the skill and ability shown by the attorney and the success resulting from the attorney's work on behalf of the grantor, much like the factors that would determine the amount of compensation awarded to a personal representative under the *Probate Act*. The typical trustee compensation of 5% of income and two-fifths of 1% of capital could be reasonable basis for compensation, given the high level of fiduciary responsibility involved. I understand this is the basis that the Public Trustee uses for

determining compensation. Additionally, the attorney has a right to be reimbursed for any disbursements or out-of-pocket expenses incurred in the course of acting as attorney.

I hope this has been helpful in raising some of the issues related to these topics.