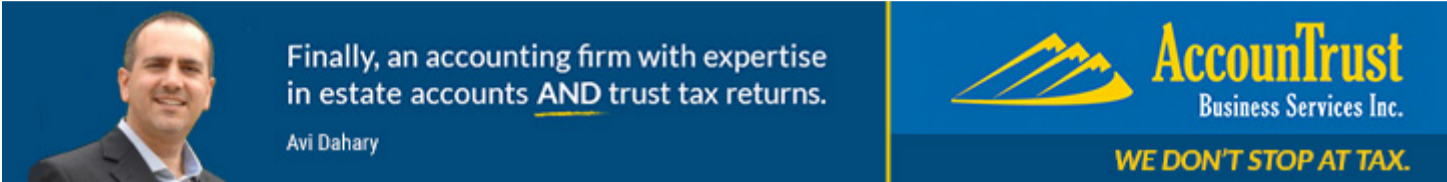


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Duties of attorney for property difficult to find



By [Charles Ticker](#)

In Ontario, the duties of an attorney for property acting under a power of attorney (“POA”) are set out in the [Substitute Decisions Act](#) (“SDA”).

An attorney who is prepared to do some research or seek legal advice will of course be referred to the SDA for more information on his or her powers and duties.

However, it is not easy to locate the actual section of the SDA that deals with the duties of an attorney. One has to go to section 38 of the SDA to ascertain that an attorney acting under a POA, where the grantor is incapable of managing property or if the attorney has reasonable grounds to believe that the grantor is incapable of managing property, is subject to the same duties (with a couple of exceptions), as a guardian for property.

The overriding duty of an attorney acting under a POA is set out in s.32(1) of the SDA:

“32. (1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person’s benefit.”

All citizens are presumed to have knowledge of the law, but most people acting as attorneys are not lawyers and probably have no idea what a fiduciary is, or what the courts have said about the duties of a fiduciary. On the other hand, unfortunately, naming a lawyer as attorney can still result in egregious breaches of trust on the part of the lawyer as happened in the case of [Zimmerman v. McMichael Estate](#).

Other duties of a guardian for property as they apply to an attorney acting under a POA are set out in section 32 of the SDA, which reads as follows:

Personal comfort and well-being

(1.1) If the guardian’s decision will have an effect on the incapable person’s personal comfort or well-being, the guardian shall consider that effect in determining whether the decision is for the incapable person’s benefit. 1996, c. 2, s. 20 (1).

Personal care

(1.2) A guardian shall manage a person’s property in a manner consistent with decisions concerning the person’s personal care that are made by the person who has authority to make those decisions. 1996, c. 2, s. 20 (1).

Exception





(1.3) Subsection (1.2) does not apply in respect of a decision concerning the person's personal care if the decision's adverse consequences in respect of the person's property significantly outweigh the decision's benefits in respect of the person's personal care. 1996, c. 2, s. 20 (1).



Explanation

(2) The guardian shall explain to the incapable person what the guardian's powers and duties are. 1992, c. 30, s. 32 (2).



Participation

(3) A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property. 1992, c. 30, s. 32 (3).

Family and friends

(4) The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person. 1992, c. 30, s. 32 (4).



Consultation

(5) The guardian shall consult from time to time with,



(a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and

(b) the persons from whom the incapable person receives personal care. 1992, c. 30, s. 32 (5).

Accounts

(6) A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property. 1996, c. 2, s. 20 (2).



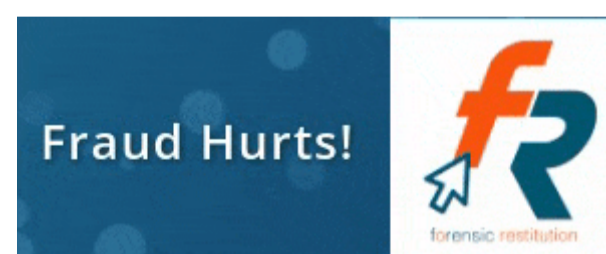
Standard of care

(7) A guardian who does not receive compensation for managing the property shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs. 1992, c. 30, s. 32 (7).



Same

(8) A guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise. 1992, c. 30, s. 32 (8).



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(9) Subsection (8) applies to the Public Guardian and Trustee. 1992, c. 30, s. 32 (9).

Application of Trustee Act

[(10) and (11) do not apply to attorneys]

(12) The Trustee Act does not apply to the exercise of a guardian's powers or the performance of a guardian's duties. 1992, c. 30, s. 32 (12).

There are other provisions of the SDA that deal with other duties of the attorney, such as:

(a) making efforts to determine whether the incapable person has a will, or if the incapable person has a will, what the provisions of that will are (section 33.1);

(b) not to dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable

person's will (s. 35.1);

(c) to make expenditures from the incapable person's property:

- a. that are reasonably necessary for the person's support, education and care;
- b. that are reasonably necessary for the support, education and care of the person's dependents;
- c. that are necessary to satisfy the person's other legal obligations (s. 37).

Section 39 of the SDA provides for a motion for directions if the attorney requires further advice with respect to any question arising in connection with the power of attorney.

It is submitted that as presently drafted, the SDA is deficient in delineating clearly the duties of an attorney acting under a POA.

A future blog will deal with the records and documents an attorney for property is required to maintain by law.


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