

Duties of Attorneys and Agents

Prepared For: Legal Education Society of Alberta

48th Annual Refresher: Wills & Estates

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For Presentation In:

Lake Louise – April 19 – 21, 2015

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INTRODUCTION

This paper addresses the nature and scope of the duties of an attorney acting under an enduring power of attorney for an incapable person and those of an agent acting under a personal directive in Alberta. The first part of this paper sets out the duties of attorneys and agents under the applicable legislation and pursuant to the case law. The second part of this paper attempts to formulate practical advice for the practitioner assisting attorneys and agents acting on behalf of incapacitated adults, and other “interested persons” who may have concerns regarding an incapable adult’s representatives and decision-makers.¹

ATTORNEYS

Duties of an Attorney

Despite its relative brevity, the *Powers of Attorney Act*² sets out some of the duties of an attorney:³

- Investment obligations: an attorney has particular investment obligations pursuant to sections 2 to 8 of the *Trustee Act*.⁴
- Duty to act and duty of care: an attorney has the duty to act when he or she begins to act or indicates acceptance of his or her appointment. In so acting, an attorney has a duty of care to exercise his or her “powers to protect the donor’s interests during any period in which the attorney knows, or reasonably ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of the donor’s estate.”⁵

¹ Thank you to my colleagues at Field LLP, Michelle Herron, student-at-law and Predrag Tomic, Associate, for their research assistance, and Lisa Statt Foy, Associate, for reviewing and commenting on draft versions of this paper. For a summary of considerations in drafting clear and complete enduring powers of attorney and personal directives, see: F. Salim “Drafting Powers of Attorney and Personal Directives: The Basics and Beyond,” Legal Education Society of Alberta, 2013.

² RSA 2000, c. P-20 [“PAA”].

³ The duties of an attorney are to be distinguished from the authorities of an attorney, which are addressed in the PAA in section 7.

⁴ Section 7.1 of the PAA. Sections 2 to 8 of the *Trustee Act*, RSA 2000 c. T-8, generally described, require the attorney to: invest the donor’s funds with a view to obtaining a reasonable return while avoiding undue risk; regularly review the investments to confirm that they continue to be appropriate; consider such issues as return and regularity of income and appreciation of capital, diversification of the investments, costs of investments and expected tax consequences; and supervise the delegation of investment authority. The duties set out in sections 3 to 8 of the *Trustee Act* are subject to a contrary intention expressed in the power of attorney. Section 4 of the *Trustee Act* limits the liability of an attorney with respect to a course of action if the attorney exercised “reasonable skill and prudence” in so acting.

⁵ Section 8 PAA.

- Duty to account: section 10 of the PAA does not create an attorney's duty to account, which exists at common law. However, this section sets out who may bring an application to compel an attorney to pass accounts.⁶

The common law duties of attorneys are thoroughly reviewed in the 2010 decision in *Taubner Estate (Re)*.⁷ The Court observed generally that the status of an attorney as a fiduciary defines an attorney's obligations: "An attorney acting under a [power of attorney] is clearly in a fiduciary relationship that imposes the obligations and duties of a trustee upon the attorney."⁸ The Court elaborated on the duties of an attorney, citing several sources, including the summary set out in the decision of the Manitoba Court of Queen's Bench in *Lander v. Lyall*.⁹

- (i) putting the donor's welfare first when taking any steps with respect to the donor's property;
- (ii) taking the wishes of the donor into account;
- (ii) exercising the judgment and care that a person of "prudence, discretion and intelligence would exercise in the conduct of his or her own affairs", as required by powers of attorney legislation; and
- (iv) handling the property in an impartial and even handed manner.¹⁰

The Court also cited M. Jasmine Sweatman's *Guide to Powers of Attorney*,¹¹ with respect to a more detailed description of an attorney's duties:

In addition to any duties expressed in the instrument at common law, the attorney has the duty to

- (a) stay within the scope of the authority delegated;
- (b) exercise reasonable care and skill in the performance of acts done on behalf of the donor (if acting gratuitously, the attorney is held to the standard of a typically prudent person managing his or her affairs; if being paid, the attorney is held to the standard applicable to a professional property or financial manager);
- (c) not make secret profits;
- (d) cease to exercise the authority if the power of attorney is revoked;

⁶ Section 10 PAA. Note that this section, which sets out the process pursuant to which an application to pass an attorney's accounts may be brought, applies notwithstanding any agreement or waiver to the contrary.

⁷ 2010 ABQB 60 [*Taubner*].

⁸ *Taubner* at para. 245 citing, *inter alia*, *Re Lefebvre Estate*, 2007 ABQB 195 [*Lefebvre*]; *Re Attorney of Ericksen*, 2008 ABQB 587; *Lander v. Lyall*, 2006 MBQB 170 [*Lander*]. It is also argued that an attorney for an incapable person may have obligations that exceed those of a trustee for a person who has capacity, because an incapable person is uniquely vulnerable, see: C.D. Freedman, "Misfeasance, Nonfeasance, and the Self-Interested Attorney," 48 Osgoode Hall LJ 457 at 484.

⁹ *Lander*, *supra*.

¹⁰ *Taubner* at para. 248 citing *Lander* at para. 12.

¹¹ Aurora: Canada Law Book, 2002 at 16; cited in *Taubner* at para. 249.