



Understanding Legal Documents for Guardianship, Powers of Attorney and Estates

Rachel Blumenfeld
Jesstina McFadden

DISCLAIMER

This Coffee Talk presentation is provided as an information service and is not meant to be taken as legal opinion or advice. Please do not act on the information provided in this presentation without seeking specific legal advice.

© Miller Thomson LLP, 2013 All Rights Reserved. All Intellectual Property Rights including copyright in this presentation are owned by Miller Thomson LLP. This presentation may be reproduced and distributed in its current state. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP which may be requested at healtheditor@millerthomson.com

Overview

1. Guardianship Orders, Powers of Attorney, and Wills
2. What to look for when relying on these documents
3. Common Issues

Introduction

1. Guardians:

- Appointed by Court to make decisions on behalf of incapable individual

2. Powers of Attorney:

- Attorneys take care of individual's affairs when they are alive

3. Wills:

- Estate Trustees implement a Will following death

Legislative Framework

Substitute Decisions Act (SDA)

- Provides for appointment of guardian (by Court) and Power of Attorney (by capable individual)
- Defines decisional authority for guardian, attorney
 - Personal Care (health care, nutrition, shelter, clothing, hygiene, safety)
 - Property (real property, income, anything financial)

Succession Law Reform Act, common law

- Will incl. appointment of executor
- Estate Trustee holds authority regarding body of deceased, funeral, burial

. . . Legislative Framework

- Operates in conjunction with decision-specific legislation, including:
 - *Health Care Consent Act (HCCA)*
 - *Personal Health Information Protection Act (PHIPA)*
 - *Long-Term Care Homes Act*
- Capable vs. incapable

. . . Legislative Framework

- Capacity depends on the decision
 - Generally, ability to understand the information relevant to making the decision and appreciate the consequences
- Who determines?
- Who can act as Substitute Decision Maker (SDM)?
- HCCA (s.20), PHIPA (s.23, 26) and LTCHA establish specific rules re: determining capacity, identifying SDM

Decision-Making

- Statutory protection to rely on assertion that individual is SDM/has authority to make decision, provided it is **reasonable** to do so
 - Understand statutory framework and obligations
 - Make appropriate inquiries
 - Request and review supporting documentation

What To Look For

1. Validity of document?
2. Who is/are authorized?
3. Scope of authority – does it include this decision?
4. Wishes/directions relevant to decision? (e.g. advance directive)

Guardianship

1. Property:

- “Over the counter” procedure
 - Application to replace PGT
- Court process
- Management Plan

2. Person:

- Guardianship Plan
 - Include wishes or instructions made by the person while capable

Continuing Power of Attorney for Property

1. Test for capacity to grant in SDA
 - May be incapable to manage property
2. “Continues” on incapacity
 - Generally, can be used once executed, even if capable
 - “Springing” or postponed effectiveness
3. Two witnesses
 - 18 and over
 - NOT the attorney, attorney’s spouse, grantor’s spouse, grantor’s child
 - NOT a mentally incapable person
4. Can sign with a mark

What does an Attorney for Property do?

- Anything in respect of property that the grantor, if capable, could do, except make a Will and beneficiary designations
- The grantor's property includes all assets and finances unless specific things are excluded from the POA document

What are an Attorney's responsibilities?

- The attorney is a fiduciary and must:
 - Account to the grantor
 - Use reasonable care in acting
 - Not act in conflict with the grantor's interest
 - Not benefit personally

When does POA for Property take effect?

- Unless the POA document states otherwise, upon execution
- Usually, the lawyer acting for the grantor will keep the original and only release it on the incapacity of the grantor

POA for Personal Care

- Appoints an Attorney to make decisions for the grantor respecting the grantor's "personal care"
- Personal care encompasses health care (incl. treatment), nutrition, shelter, clothing, hygiene and safety
- Subject to conditions in the HCCA, the POA for Personal Care places the attorney ahead of all the grantor's relatives for purposes of giving or withholding consent for a treatment

... POA for Personal Care

- Test for capacity to grant in SDA
 - Ability to understand whether proposed attorney has genuine concern for welfare and appreciate that attorney may need to make decisions
- Two witnesses
 - 18 and over
 - NOT the attorney, attorney's spouse, grantor's spouse, grantor's child
 - NOT a mentally incapable person
- Can sign with a mark
- Attorney cannot provide health care, residential/social/training/support services to grantor for compensation unless spouse, partner, relative

When does POA for Personal Care take effect?

- Powers take effect when:
 - The HCCA applies to the decision and authorizes the Attorney to decide
 - When the HCCA does not apply and the Attorney has reasonable grounds to believe the grantor is incapable of making the decision, subject to any limitations in the POA document

Note on “Advance Directives”

- Not a “legal” term in Ontario → written expression of “wishes”
- Speaks to SDM
- Can be set out in POA or other document
- SDA, HCCA require that SDM(s) make decisions accordance with:
 - prior express wishes made while capable that are applicable to circumstances;
 - If none, then “best interests”

On Death

- Guardianship and POAs terminate upon death
- Executor of estate essentially “steps into shoes of deceased” (*Succession Law Reform Act*, common law)
- Executor/Estate Trustee named in the Will
 - May or may not apply for probate (Certificate of Appointment of Estate Trustee)
- PHIPA: “Estate Trustee or other person who assumes responsibility for administering estate, if there is no Estate Trustee”

Common Issues

- **Can patient “verbally” appoint an attorney for property/personal care?**
 - SDA requires that POA must be in writing, signed and witnessed
 - Must be capable to grant POA (but not necessarily capable to make decisions)

... Common Issues

- **If POA names more than one attorney, is the consent of one attorney sufficient?**
 - General rules:
 - If silent = must act together
 - “Jointly” = must act together
 - “Severally” = may act independently
 - Majority rule provision?
 - Multiple attorneys of equal rank vs. alternate attorneys

. . . Common Issues

- Also subject to legislation applicable to decision
 - HCCA (s.20), PHIPA (s.26)
 - A person . . . may only consent if no person described in an earlier paragraph meets the requirements
 - Person may consent . . . if s/he believes no person described in an earlier or the same paragraph exists, or exists but is not a guardian, POA or personal representative and would not object to him/her making decision

... Common Issues

- **What if there is more than one document?**
 - Nature of decision?
 - Guardianship Order prevails over POA
 - Can have both POA for Property and POA for Personal Care
 - More recent prevails over previous
 - “POA is terminated when the grantor executes a new POA, unless the grantor provides that there shall be multiple POAs” (SDA s.12, s.53)
 - Capacity to grant/revoke
 - A person is capable to revoke a POA if they are capable of granting one

... Common Issues

- **If guardian/attorney is making poor decisions, can I revoke their authority?**
 - Care providers have no authority to “revoke” a guardianship or POA
 - Guardianship can only be revoked by Court
 - POA can only be revoked by grantor capable of revoking POA
 - Can “challenge” decision in certain circumstances
→ application to Consent and Capacity Board

. . . Common Issues

- **Attorney/Guardian has requested a copy of health record for deceased patient – can I provide it to him/her?**
 - Authority of POA (or guardianship) terminates on death
 - PHIPA
 - If individual is deceased, the deceased’s estate trustee, or the person who has assumed responsibility for the administration of the deceased’s estate, if the estate does not have an estate trustee” . . . may give or refuse consent (s.23(1))
 - “Executor” (will), “estate trustee”, court appointed administrator
 - Informal assumption of responsibility (“representative”)
 - Due diligence

Questions?

Rachel Blumenfeld

rblumenfeld@millerthomson.com

416.596.2105

Jesstina McFadden

jmcfadden@millerthomson.com

416.595.2990

Thank you!