

Plan Well. Live Well. Be an Effective Executor, Trustee or Attorney/Guardian for Property and Care.

Date: March 1, 2020

Executors, trustees and attorneys/guardians are all part of the legal category known as “fiduciaries”. What this term means is that a person (or an entity such as a trust company) has been appointed to act on behalf of the person appointing them in the case of attorneys and guardians, or on behalf of beneficiaries in the case of estates and trusts.

The key rule to remember is that all fiduciaries are required to act in the best interests of the person(s) they serve. They are also required to keep records of the decisions they make and all property or finances they are administering.

Role of Other Professional Advisors

Fiduciaries are not expected to be experts in all matters they may be called upon to address. Therefore, to ensure they carry out the mandate of acting in the best interests of the persons they serve, as well as protecting themselves from liability, fiduciaries are allowed and even encouraged to retain professional advisors such as: lawyers, accountants, financial planners, insurance advisors, valuers, real estate agents, etc., and claim reimbursement for costs.

Executors and Trustees

Other legal rules that apply to executors and trustees include, but are not limited to:

1. **Duty to Account.** The means that the persons appointed must report to the persons on whose behalf they are working, when asked. There is no specific reporting cycle unless stated in the appointing document or by court order.
2. **No profit-taking or personal benefit unless legally authorized.** Authorization can be provided as a result of legislation, case law and court order, or the document appointing the person depending on the relevant circumstances.

3. **Even hand rule.** This means the executors or trustees are required to act in a balanced manner between all classes of beneficiaries (i.e. income vs. capital or primary vs. remainder) unless the appointing document or court order overrides this requirement.

Attorneys/Guardians for Property

Where capacity has been lost by the person being assisted (the “grantor”), this role is similar to that of a trustee. Prior to this, the attorney is only an agent and is restricted to carrying the tasks specifically requested by the grantor or otherwise specified in the POA document.

The appointment can cover all property of the grantor or be limited to specific property or time period, as well as only coming into effect only on incapacity. The law or appointing document may impose other restrictions on the ability to act with respect to specific issues.

Attorneys/Guardians for Personal Care

Acting as an attorney or guardian for personal care is a unique role since it touches on many sensitive issues such as what one person considers quality of life. This can be informed by many things including religion, personal beliefs and relationships, as well as favourite activities. Therefore, understanding the person for whom you will be making decisions is critical.

Attorneys and guardians for care must take into consideration the wishes of an incapable person expressed while capable. However, these expressions may not always be in writing although it is preferable. The ideal situation is for dialogue to take place before capacity is lost and urgent decisions need to be made. This is sometimes referred to as advance care planning and can include discussions with health professionals as appropriate.

Compensation

The rules for executors and trustees is determined by case law. The basic rule allows a maximum of 2.5% on each of capital and income received and a maximum of 2.5% on capital and income disbursed. This is not a set tariff and claims must be supported by proof of work done. Pre-taking compensation is not allowed unless set out in the terms of the Will or trust.

The rules for attorneys or guardians for property are covered by regulations under the *Substitute Decisions Act*. The maximum is 3% on each of capital and income received and a maximum of 3% of capital and income disbursed. The claim must also be supported by proof of work done.

Ontario law currently does not provide specific rules for the compensation of attorneys or guardians for personal care.

In all three (3) cases, the amount allowed can be changed by the terms of the appointing document, agreement or court order.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

