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## **Planning for Mental Incapacity**

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# Planning for Mental Incapacity

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## Topics

- Delegation of Powers of Attorney
- Capacity to Give and Revoke
- Attorney's Obligation to Monitor
- Prevention of Abuse
- Resignation of Attorney

## Delegation of an Attorney's Powers

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## Delegation of Powers of Attorney

### Questions:

- Can a grantor authorize an attorney to delegate some or all of the attorney's powers?
- Are there any limits under the *Substitute Decisions Act* to authorizing delegation of an attorney's powers?

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## Delegation of an Attorney's Powers

### **What are the powers of an attorney?**

- The maximum extent of an attorney's powers are **“to do on the grantor's behalf anything in respect of property the grantor could do if capable, except make a will”**: SDA, s. 7(2).
- The powers are identical to the powers of a guardian of property under s. 31(1).

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## Delegation of an Attorney's Powers

### **What are the statutory limitations of an attorney's powers?**

- Under s. 7(6) of the SDA, an attorney's powers are subject to two limitations:
  - Any limitations contained in Part I of the SDA; and,
  - Any conditions and restrictions in the power of attorney document that are consistent with the SDA.

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## Delegation of an Attorney's Powers

### **It is not possible to enhance an attorney's powers:**

- The statutory maximum is **“anything in respect of property the grantor could do, if capable, except make a will.”**
- The only possible effect of special clauses in a continuing power of attorney is to restrict or limit the attorney's powers, not to enhance them.

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## A Couple of Riddles . . .

### **Which is longer?**

- Forever?
- Forever . . . and ever?

### **Which powers are greater?**

- Anything in respect of property?
- Anything in respect of property . . . and [something else] in respect of property?

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## Delegation of an Attorney's Powers

### **Duties of an attorney:**

- Most of the duties of a guardian apply to an attorney for property: SDA, s. 38(1).
- An attorney **“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”**: s. 32(1).
- There are other related duties: ss. 32-38.

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## Delegation of an Attorney's Powers

### **It is not possible to limit an attorney's duties:**

- There is no provision for the limitation of an attorney's duties in Part I of the SDA.
- An attorney who does not receive compensation is subject to all of the same duties, but a lower standard of care in the management of the estate: SDA, s. 32(7) and (8).

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## Delegation of an Attorney's Powers

### **A delegation clause is not capable of:**

- Giving any additional power that would not already be contained in an unconditional and unrestricted continuing power of attorney; or,
- Limiting any of an attorney's duties set out in ss. 32-38 of the SDA.

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## Delegation of an Attorney's Powers

### **A delegation clause is not capable of authorizing an attorney to appoint other substitute attorneys:**

- The grantor, if capable, could only appoint substitute attorneys in solemn form in the power of attorney document itself, accordance with s. 10 of the SDA.
- The appointment of substitute attorneys by anyone other than the grantor would be inconsistent with Part I of the SDA.

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## Delegation of an Attorney's Powers

### **An attorney cannot delegate the whole of the attorneyship:**

- A continuing power of attorney
  - is more than a property transaction;
  - creates a fiduciary relationship that affects the outcome of the grantor's personal-care decisions as well; and,
  - can only be established by the grantor him or herself.

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## Delegation of an Attorney's Powers

### **An attorney may delegate powers, but not duties:**

- An attorney can delegate any powers that the grantor, if capable, could also delegate.
- An attorney for property is not able to delegate the attorney's duties found in ss. 32-38 of the SDA.
- A power of attorney for personal care has no powers, but only duties, none of which can be delegated.

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## Delegation of an Attorney's Powers

### **Continuing liability of an attorney:**

- While it is quite appropriate for an attorney to delegate transactional powers through trust or agency arrangements, the attorney may continue to be liable for damages for any breach of the attorney's duty: SDA, s. 33(1).
- A court may relieve an attorney who has acted honestly, diligently and reasonably from all or part of the liability: s. 33(2)

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## Delegation of an Attorney's Powers

### **Summary**

- A delegation clause can emphasize the grantor's awareness of and the attorney's authority to enter into trust and agency arrangements on behalf of the grantor.
- An attorney cannot delegate the whole of the attorneyship, or appoint substitute attorneys outside of Part I of the SDA.
- An attorney can use trustees and agents, and can delegate powers but not duties.
- An attorney will usually remain liable for the acts of his or her trustees and agents.

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## Capacity to Give or Revoke a Power of Attorney

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## Capacity to Give and Revoke

### Questions:

- What are the tests of capacity to give and revoke a continuing power of attorney [for property]?
- What are the tests of capacity to give or revoke a power of attorney for personal care?

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## Capacity to Give and Revoke

### **Four separate tests of capacity:**

- To manage property: s. 6.
- To give or revoke a continuing power of attorney: s. 8.
- To make personal care decisions: s. 45.
- To give or revoke a power of attorney for personal care: s. 47.

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## Capacity to Give or Revoke

### **The capacity to give a power of attorney is the very same capacity to revoke it:**

- “A person is capable of revoking a continuing power of attorney if he or she is capable of giving one”: s. 8(2).
- “A person is capable of revoking a power of attorney for personal care if he or she is capable of giving one”: s. 47(3).

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## Capacity to Give or Revoke

### **A person may have capacity to give or revoke despite an underlying incapacity:**

- “A continuing power of attorney is valid if the grantor, at the time of executing it, is capable of giving it, **even if he or she is incapable of managing property**”: s. 9 (1).
- “A power of attorney for personal care is valid if the grantor, at the time of executing it, is capable of giving it, **even if he or she is incapable of personal care**”: s. 47 (2).

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## Capacity to Give or Revoke

### **Capacity to give or revoke a Continuing Power of Attorney (s. 8):**

- Knowledge of
  - Kind and approximate value of property
  - Obligations owed to dependants
  - Powers of an attorney for property
  - Attorney's duty to account
  - Grantor's ability to revoke the power of attorney
- Appreciation of
  - Risk of loss through mismanagement
  - Risk of loss through dishonesty or abuse.

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## Capacity to Give or Revoke

### **Capacity to Give or Revoke a Power of Attorney for Personal Care (s. 47 (1)):**

- An ability to understand whether the attorney “has a **genuine concern for the person’s welfare**”; and,
- Appreciation that **the attorney make actually have to make personal-care decisions** for the grantor.

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## Capacity to Give or Revoke

### **Assessment of Capacity to Give or Revoke:**

- A formal assessment or evaluation of capacity is not required by law before giving or revoking a continuing power of attorney or a power of attorney for personal care.
- **Capacity to give or revoke is a legal issue** to which a lawyer should be attuned and prepared to give legal advice on in connection with the preparation and execution of any power of attorney.
- An outside opinion on donative capacity may be advisable in individual cases.

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## **An Attorney's Duty to Monitor a Gradually Declining Grantor**

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### **Attorney's Obligation to Monitor**

#### **Questions:**

- What is the attorney's obligation to monitor a grantor who is gradually losing mental capacity?
- Is the attorney liable for financial losses if the grantor has always signed for financial transactions?

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## Attorney's Obligation to Monitor

**There is no specific duty to monitor a gradually declining grantor set out in the SDA.**

- Some other jurisdictions (e.g., Manitoba) have a positive duty for an Attorney to act when the grantor becomes incapable; but Ontario does not.
- Any duty to monitor fits within the overall fiduciary duties of diligence, honesty and integrity: s. 32(1).

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## Attorney's Obligation to Monitor

**There may be a genuine dispute over the Grantor's capacity to manage property**

- A continuing power of attorney will not normally prevent a capable grantor from accessing his or her own property.
- As a fiduciary, an attorney should be sensitive to not trammeling the legal rights of the grantor to assert his or her own decision-making authority.

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## Attorney's Obligation to Monitor

### **An appropriate response may be to assist the grantor in having access to justice**

- If decisional capacity is in issue, an attorney should not interfere with or restrict the grantor's right to obtain independent legal advice and representation.
- With access to justice, disputes over financial decision-making capacity can be resolved by agreement or if necessary by court application.

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## Attorney's Obligation to Monitor

### **An Overall Duty of Diligence:**

- Generally, an attorney will not be responsible for not having accepted an attorneyship and for not having administered an incapable person's estate.
- Liability would not normally attach unless an attorney has in some way acknowledged or accepted the attorneyship, and then failed to act diligently.

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## Attorney's Obligation to Monitor

**Is the attorney responsible for financial losses if the grantor has always signed for financial transactions?**

- Normally, the attorney is responsible for his or her own transactions, and those of his or her agents, but not those of the grantor.
- A lack of oversight caused by a failure of diligence, honesty or integrity could form a breach of fiduciary duty.

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## Attorney's Obligation to Monitor

**The signing of financial documents may not reflect the underlying decision-making authority**

- A financially incapable person who merely signs cheques or other financial documents prepared by or on behalf of an attorney would not relieve the Attorney of his or her fiduciary duties.

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## Attorney's Obligation to Monitor

### **Access to Money for Personal Needs:**

- It would be normal to give a financially incapable person access to appropriate amounts of money for personal needs (and the PGT routinely does so).
- Failure to monitor overspending by a financially incapable person could form a lack of diligence by an attorney for property giving rise to a breach of fiduciary duty.

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## **Protocols to Prevent the Abuse of a Power of Attorney**

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## Prevention of Abuse

### **What protocols (if any) should be used to ensure that a Continuing Power of Attorney is not misused?**

- Proper execution of the power of attorney document.
- Expression of confidence in the intended attorney(s).
- Conditions of delayed effectiveness.
- Directions for safekeeping of powers of attorney.
- Conditions of monitoring and/or periodic reporting.

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## Prevention of Abuse

### **Proper Execution of the Power of Attorney document:**

- Whose idea is the power of attorney?
- Who is giving instructions for the preparation of the document: the grantor or the attorney?
- Is there truly “independent” legal advice?
- Is there a possibility of identity theft?
- Does the grantor have donative capacity?

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## Prevention of Abuse

### **Expression of Confidence in the Attorney(s):**

- Does the grantor appreciate the risks of mismanagement and abuse?
- How do the attorney(s) manage their own finances now?
- Are the attorney(s) under any form of their own financial stress?
- Does the grantor's confidence extend to every attorney and substitute attorney?
- Failure to name a substitute attorney does is not negligent where no-one suitable is available.

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## Prevention of Abuse

### **Conditions of Delayed Effectiveness:**

- Does the grantor want the attorney(s) to have immediate access to all of the grantor's property?
- Most older adults assume that a continuing power of attorney will not take effect until and unless the grantor becomes incapable.
- They do not know that the power of attorney takes effect when it is signed unless it has a condition of delayed effectiveness (s. 8(7)).

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## Prevention of Abuse

### **Directions for Safekeeping of the Power of Attorney Document**

- Authorizes and directs the grantor's solicitor to hold the power of attorney document for safekeeping until presentation of evidence of incapacity.
- Routinely used in place of a condition of delayed effectiveness.
- Does not address the underlying issue of the effectiveness of the power of attorney.
- Has the potential to make the solicitor (for the grantor) a stakeholder in any dispute over the grantor's decisional capacity.

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## Prevention of Abuse

### **Conditions of Monitoring and/or Periodic Reporting**

- There is no mandatory requirement of monitoring or of periodic reporting for continuing powers of attorney in Ontario.
- The appointment of a monitor is mandatory for the appointment of a financial representative in certain limited circumstances in British Columbia.
- The appointment of a monitor, with periodic reporting, could reduce the opportunity for abuse after the loss of financial capacity.

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## The Resignation of an Attorney for a Grantor who has Lost Capacity to Name a Replacement

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### Resignation of an Attorney

#### **Can an Attorney resign if the Grantor has lost capacity to name a replacement?**

- Yes: Resignation may be the only viable course of action where:
  - the attorney for any reason is not able to carry out his or her fiduciary duties; or,
  - the grantor has lost confidence in the attorney
- If resignation is handled properly, an attorney is not necessarily irreplaceable.

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## Resignation of an Attorney

### **The resignation of an Attorney should only be done with Diligence, Honesty and Good Faith**

- An attorney should not act capriciously or without regard for the incapable person's best interests in resigning.
- An attorney should take steps to arrange another substitute decision-maker, if one is needed, in the face of a resignation.
- A failure to act diligently in the course of resignation could form a breach of fiduciary duty giving rise to liability for damages.

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## Resignation of an Attorney

### **Statutory Duty of Notice (s. 11(1)):**

If an attorney has acted, the attorney's resignation is **not effective** until the attorney delivers a copy of the resignation to

- (a) the grantor
- (b) any other attorneys under the POA
- (c) any substitute attorneys . . .

**. . . AND**

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## Resignation of an Attorney

### **Notice to Spouse or Partner and Relatives where there is no substitute Attorney:**

- “(d) Unless the power of attorney provides otherwise, the grantor’s spouse or partner and the relatives of the grantor who are known to the attorney and reside in Ontario, if,
- (i) the attorney is of the opinion that the grantor is incapable of managing property; and,
  - (ii) the power of attorney does not provide for the substitution of another person or the substitute is not able and willing to act.”

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## Resignation of an Attorney

### **Notice to Other Persons (s. 11(2)):**

- “An attorney who resigns shall make reasonable efforts to give notice of the resignation to persons with whom the attorney has dealt on behalf of the grantor, and with whom further dealings are likely to be required on behalf of the grantor.”

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## Resignation of an Attorney

### **There are other means of substitute decision-making if an Attorney for property resigns:**

- A federal income-security trusteeship may suffice if the grantor has no assets and only federal income security benefits.
- A statutory guardianship may be arranged if the incapable person does not refuse an assessment of capacity to manage property that the resigning attorney might arrange.

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## Resignation of an Attorney

### **If an income-security trusteeship or a statutory guardianship does not work, there are other means of last resort:**

- An application for court-appointed guardianship of property or of the person, or both, may be brought.
- A report to the Office of the Public Guardian and Trustee, Guardianship Investigations Unit, may be made under ss. 27 and 62 of the SDA.

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