

TAB 2

Compensating Attorneys for Personal Care

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Practice Gems: Drafting and Administering Powers of Attorney for Personal Care and Property 2010 *Avoiding the Pitfalls*



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CONTINUING PROFESSIONAL DEVELOPMENT

Compensating Attorneys for Personal Care

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Statutory Entitlement to Compensation?

Section 40 of the *Substitute Decisions Act, 1992*¹ expressly contemplates that an attorney for property may receive annual compensation in respect of their efforts. However, an attorney for personal care has no comparable statutory entitlement under the *Substitute Decisions Act*. While section 90(1)(c) states that the Lieutenant Governor of Ontario may make regulations prescribing the circumstances in which a person's guardian of personal care (and presumably their attorney for personal care) may be compensated, no such regulations have been passed, as yet.

The wording of the provisions of the *Substitute Decisions Act* would suggest that an attorney for personal care cannot claim compensation. Thankfully, a number of recent Ontario Superior Court decisions make it clear that in appropriate circumstances an attorney for personal care can be compensated pursuant to section 61(1) of the *Trustee Act*².

The leading case is the 1999 decision of Justice McDermid in *Re Brown*.³ The Trust Company of the Bank of Montreal in that case sought to pass its accounts in its capacity as committee of property and of person of Mr. Brown. On the passing of accounts, the trust company advanced a claim for personal services of \$2,725. The Public Guardian and Trustee opposed the claim on the basis that the trust company had no statutory entitlement to compensation.⁴

Justice McDermid rejected the position taken by the Public Guardian and Trustee and awarded the guardian compensation for a two year period of \$2,725. He also made the following observations and comments at paragraph 4:

¹ S.O. 1992, c. 30 (as amended) (the "*Substitute Decisions Act*")

² R.S.O. 1990, c. T23 (as amended)

³ [1999] O.J. No 5851, 31 E.T.R. (2d) 164 (S.C.).

⁴ See also *Sandhu (Litigation Guardian of) v. Wellington Place Apartments* [2006] O.J. No 2449, 149 A.C.W.S. (3d) 572, [2006] O.T.C. 516 (S.C.).

- “(a) There is no statutory prohibition against such compensation...
- (b) The fact that the Legislature has not passed a statute or regulation providing for the payment of compensation to a guardian of person or fixing the manner in which it is to be calculated does not... prevent the court from awarding and fixing it.
- (c) I do not believe section 32(12) of the *Substitute Decisions Act* ousts the application of section 61(1) of the *Trustee Act* as a basis of awarding compensation to a guardian...
- (d) ... I believe the court does have jurisdiction to award compensation for legitimate services rendered by a committee of the person to an incapable person so found, provided that there is sufficient evidence about the nature and extent of the services provided and evidence from which a reasonable amount can be fixed for compensation.
- (g) The hallmark of such compensation must be reasonableness. The services must have been necessary or desirable and reasonable. The amount claimed must also be reasonable.
- (h) The reasonableness of the claim for compensation will be a matter to be determined by the court in each case, bearing in mind the need for services, the nature of the services provided, the qualifications of the person providing the services, the value of such services and the period over which the services were furnished...
- (i) There must be some evidentiary foundation to support the claim for compensation.”⁵

Justice D. M. Brown’s recent decision in *Kiomall v. Kiomall*⁶ makes it clear before an order granting an attorney or guardian of personal care compensation is made the Court must be satisfied that the amount awarded is “reasonable” not only in relation to the services performed but also proportional to the means of the incapable grantor. In that case, Justice Brown reduced the applicant/guardian of personal care’s claim to compensation by approximately 2/3rds (from \$45,000 over a three year period to approximately \$14,000) where the Order would have had the effect of depleting the capital of the incapable grantor’s estate.

⁵ See *Srutis v. Srutis* [2001] O. J. No. 1199 where the Court granted an attorney for personal care’s modest claim to compensation where it was persuaded that the claim was reasonable in the circumstances.

⁶ [2009] O.J. No 1718 (S.C.)

Finally, the decision in *Cheney v. Bryne*⁷ should be noted on the issue of “reasonableness” of the compensation claimed. In that case, Justice Lalonde allowed a claim to compensation advanced by two lawyers acting as attorneys for personal care of Mrs. Bryne at their professional rate of \$250 hour based on time spent subject to a reduction by 30% to reflect the fact that other persons rendered the difficult personal care services to Mrs. Bryne.

Suggestions for the Drafting Solicitor

The issue as whether or not a client’s attorney for personal care is to be compensated should be raised in the drafting process. If the grantor expresses a desire to see their attorney for personal care compensated, the Power of Attorney for Personal Care should expressly provide an entitlement **AND** set out the basis on which the entitlement is to be calculated (e.g. a specified amount every quarter or a specified amount per hour). The document should further provide that the attorney is entitled to be reimbursed in respect of all out-of-pocket expenses they incur. If the client does not want their attorney for personal care to be compensated a statement to that effect should be made in the Power of Attorney for Personal Care. As importantly, the client should be advised that by including such a prohibition the grantor runs the risk of having their chosen substitute-decision maker renounce their appointment.

The following circumstances, among others, will inform the decision as to whether or not to compensate an attorney for personal care and, if so, on what basis:

- The relationship between the grantor and the attorney
- The qualifications of the attorney
- The means of the grantor
- The nature and extent of the personal care provided
- Whether the attorney for personal care is also appointed as the attorney for property

⁷ [2004] O.J. No 2773, [2004] O.T.C. 563, [2004] O.T.C. 563, 9 E.T.R. (3d) 236, 132 A.C.W.S. (3d) 394 (S.C.)

- The nature of the relationship between the attorneys for property and personal care, if different people
- The attorney's location vis a vis the grantor

Some Suggested Clauses

1. **No Compensation** - No individual acting as one of my attorneys for personal care shall be entitled to charge or be paid any compensation for serving in that role.

2. **Compensation** – I hereby declare that my attorney for personal care shall be entitled to reasonable compensation from my property in acting as my attorney during any future incapacity on my part, such compensation to be determined in co-operation with my attorney or attorneys acting under a continuing power of attorney for property or, failing which, with my court-appointed guardian of property.

3. **Compensation Agreement** - My attorney or attorneys for personal care shall be entitled to receive and shall be paid by my attorney or attorneys for property or, if I have no validly appointed attorney for property, then by my guardian for property appointed by a court of competent jurisdiction, out of my assets, as compensation for acting as my attorneys, the fees, reimbursement and other compensation provided for in the Compensation Agreement signed by me on the <*> day of <*>, <*>, prior to the execution of this Power of Attorney for Personal Care, which Compensation Agreement is hereby incorporated by reference into this document.

- The Compensation Agreement could then provide “My attorney or attorneys for personal care shall be entitled to be paid compensation at a rate equal to \$ <*> per hour in respect of the time spent attending to my personal care to a maximum of \$ <*> per month provided they delivered a detailed accounting to my attorney or attorneys for personal care or, failing which, to my court-appointed guardian or property.”
- The Compensation Agreement could also include a clause relating to the reimbursement of expenses (see below).

4. **Reimbursement of Expenses** - My attorney or attorneys for personal care shall be entitled to receive and shall be paid by my attorney or attorneys for property or, if I have no validly appointed attorney for property, then by my guardian for property appointed by a court of competent jurisdiction, out of my assets, reimbursement of all out of pocket expenses incurred by them in providing for my personal care including any expenses incurred in obtaining an assessment of my capacity.

5. **Fees and Reimbursement of Expenses**⁸ - All expenses incurred by my attorneys for personal care in carrying out their duties (including obtaining an assessment of my capacity, if required) shall be payable by me or my attorney for property out of my assets. My attorneys for personal care shall be compensated for acting as my attorneys in an amount which my attorneys for personal care and my attorney for property or my guardian of property shall consider appropriate in view of the duties so carried out, and such compensation shall be payable by me or my attorney for property or guardian of property out of my assets.

Suggestions when Advising an Attorney for Personal Care

In circumstances where a Power of Attorney for Personal Care is silent on the issue of compensation, how might a deserving attorney for personal care secure an Order awarding them compensation? If they also act as the grantor's attorney for property, they could advance a claim for compensation in the context of a passing of accounts. If they do not also act as the grantor's attorney for property the first step, in my mind, is to make a formal demand for compensation of the attorney for property. If the attorney for property refuses to honour the claim to compensation, the attorney for personal care could bring an application pursuant to section 68 (1) of the *Substitute Decisions Act* during the grantor's lifetime for an Order entitling them to compensation. They could also (as in *Sruits v. Sruits*) advance the claim following the grantor's death. Whenever the claim is advanced, the attorney for personal care would need to lead evidence relating to the nature and extent of the services they provided and make the case that the claim to compensation is reasonable in the circumstances.

⁸ Precedent offered by Mary L. MacGregor in her book "*Wills and Powers of Attorney*", Third Edition (Canada Law Book: 2004) at page 287