



LAFRENIÈRE SANNA  
— ESTATE LAW —  
A B O U T I Q U E F I R M

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## Acting Under a Power of Attorney

### Two Kinds of Powers of Attorney

There are two kinds of “Powers of Attorney” documents:

- Power of Attorney for Property;
- Power of Attorney for Personal Care.

Please see our brochure entitled *Information About Powers of Attorney* for general information about Powers of Attorney. This brochure discusses the duties and responsibilities of an attorney under a Power of Attorney for Property but not under a Power of Attorney for Personal Care.

### Scope of Authority as an Attorney

An attorney can do anything relating to property and financial affairs that the grantor could do if she or he were capable, except make or change a Will.

### Limitations on an Attorney

An attorney does not have the authority to stop the grantor from dealing with his or her own property. If this became necessary, someone would have to make an application to Court to be appointed guardian of property.

Generally, an attorney may not dispose of property which is specifically mentioned in the grantor’s Will except in very limited circumstances. For example, such disposition might become necessary to ensure there were enough funds to pay for the housing and care of the grantor.

There may be specific limits on the attorney’s authority which are spelled out in the Power of Attorney for Property.

The attorney’s discretion to spend money on behalf of the Grantor is generally limited to the following:

- support, education and care of the grantor;
- support, education and care necessary for the grantor’s dependents;
- debts and taxes of the grantor.

Unless the Power of Attorney says otherwise the attorney may not delegate (give) his or her authority to another person.

### Can I Give Gifts or Make Loans on Behalf of the Grantor?

Provided there is enough money or assets to pay the above expenses, the attorney can make charitable gifts on behalf of the grantor if such gifts are mentioned in the Power of Attorney or if there is evidence that similar gifts were being made while the grantor was capable. For example, prior year income tax returns may show that the grantor made regular donations to certain charities. However, the gifts cannot total more than 20% of the annual income from the grantor’s property.

The attorney can only make gifts and loans to people if the grantor, when he or she was mentally capable, had expressed an intention to make the gift or loan.

### What are my Duties?

The attorney must consider the personal welfare of the grantor and must communicate with the person who is the attorney for personal care. In the case of a conflict between the two, precedence will likely be given to the Power of Attorney for

Personal Care. The best interests of the grantor must always be given top priority.

The attorney must exercise a standard of care when acting on behalf of the grantor. If acting without being paid, the attorney is held to a standard of care, skill and diligence with which a typically prudent person would manage their own affairs. If being compensated (paid), the attorney is held to the standard of a person in the business of managing other's person's affairs (solicitor or trust company).

The attorney must make reasonable efforts to determine whether the grantor has a Will and what the Will says.

The attorney must consult with the grantor's family and others close to him or her. The attorney has a duty to cooperate with supportive family members and friends without divulging any financial information.

The attorney must try to explain matters to the grantor and encourage their participation in decision-making and considering the mental capacity of the grantor. If the attorney has taken over the grantor's affairs due to a decline in his or her health, the attorney must consider whether the grantor will be able to return to, or continue to live in, his or her home or if it is likely that he or she will permanently move to a nursing home, a retirement residence or live with a family member. If there is any reasonable possibility that the grantor may recover sufficiently to return to his or her home, the attorney must not make any irreversible decisions quickly particularly if there is no financial expediency for doing so. If someone else is the attorney of personal care (or the guardian of the person), the attorney must also consult with this person when making financial decisions that affect the grantor's personal care, such as where the grantor will live.

Immediately upon taking over the grantor's financial affairs, it is recommended that the grantor's mail be re-directed to the attorney, either by completing the appropriate form through the post office or by contacting each of the grantor's creditors, banks, and so forth to notify them of the change of address. The attorney will be asked to provide each institution with a notarial copy of the Continuing Power of Attorney for Property to prove he or she is the appointed attorney.

The attorney should immediately review the grantor's papers to determine if there are any outstanding bills. The attorney will need to attend

at the grantor's bank to prove he or she is the appointed attorney by providing the bank with a notarial copy of the Continuing Power of Attorney for Property or allowing the bank to photocopy the original and return it immediately. Unless the attorney is known to the bank staff, he or she will be asked to provide identification. Once a signature card has been signed by the attorney at the grantor's bank, the attorney can then make the necessary arrangements to pay any outstanding bills.

The attorney is responsible for filing the income tax returns of the grantor as well as payment of any income taxes, penalties and interest that may be owing. Filing deadlines are the same regardless of who is doing the filing. The attorney may seek the advice of a tax accountant to assist with any outstanding income tax returns and to ensure that quarterly income tax installments are made on time, if any. Note that when filing the grantor's tax returns with Canada Revenue Agency (CRA), the attorney will need to include a notarial copy of the Continuing Power of Attorney for Property.

Although the attorney may allow financial institutions and others to see a copy of the original Continuing Power of Attorney for Property document, the original document must never be given to anyone. It is recommended that the attorney have several notarial copies prepared which can then be given to institutions that request it, such as banks, CRA, the post office, and others as needed.

An attorney can be held to account if they fail to carry out their duties according to law.

## **Accounting Records**

The attorney must keep an accounting (copies of receipts, cheques, deposits, bills paid, etc.) of all transactions made on behalf of the grantor while acting under the Power of Attorney for Property. Please see our brochure entitled Estate Accounting for Estate Trustees and Attorneys for further information on keeping accounting records.

## **Can I be Compensated for Acting as an Attorney?**

Unless otherwise stated in the Power of Attorney, an attorney is permitted to take compensation for work completed on behalf of the grantor. The usual amount claimed is 3% of capital and revenue receipts and income disbursements annually. In addition, an attorney can be paid a Care and Management fee of 3/5 of 1% of the

average annual value of the assets being managed. Please see our brochure entitled Estate Accounting for Estate Trustees and Attorneys for further information on compensation.

## **Termination of Authority**

A Power of Attorney is terminated or cancelled by any of the following:

- the grantor dies;
- the attorney dies or becomes mentally incapable;
- the grantor becomes bankrupt;
- the attorney renounces by giving notice to the co-attorney or substitute attorney, the Office of the Public Guardian and Trustee and the various institutions where the attorney conducted business on behalf of the grantor;
- the grantor signs a new Power of attorney;
- the grantor revokes or cancels in writing;
- the end of a certain time period as stated in the Power of Attorney, if any.

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Version: 20221219