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ATTORNEY ACCOUNTABILITY

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A. INTRODUCTION

This paper is presented in conjunction with "Powers of Attorney: A Litigation Perspective" prepared by Dana Nelko and presented through the Law Society of Manitoba Continuing Professional Development Program. Reference to Mr. Nelko's paper will be to "The Companion Paper".

Power of attorney accounting requirements and the related legal duties of attorneys will be considered herein. In addition, case law on a variety of issues will be examined relating to attorney duties and related practical implications when giving advice to a party in a POA dispute.

B. ACCOUNTING REQUIREMENTS: *POWERS OF ATTORNEY ACT*

Section 22 of *The Powers of Attorney Act* provides that an attorney has a duty to provide an accounting, either upon demand by a person named as a recipient of an accounting (if so named) by the donor in the enduring power of attorney, or where the donor has not named a recipient, to the nearest relative on an annual basis. This mandatory accounting obligation arises for an enduring power of attorney when, pursuant to Section 19(1) of the Act, the donor is incompetent and the attorney has acted or indicated acceptance of the appointment.

The provision of an accounting is made mandatory, but the question arises as to how is this mandatory obligation communicated effectively to the attorney?

The duty to account in the context of a will is clear and "policed" by the court. The power of attorney may contain a direction that an accounting should be provided, but seldom are the details of what is required for such an accounting communicated. Further, there is no obligation for the attorney to consult legal counsel and it must be remembered that one of the reasons that the power of attorney document was executed in the first place, was to streamline the management of the donor's financial affairs for little or no cost. Consulting a lawyer costs money and is certainly not the first item on an attorney's "to do list" when he or she begins to manage the donor's affairs.

Should *The Powers of Attorney Act* mandate a Notice to Attorney Appendix to a valid enduring power of attorney in Manitoba that clearly sets out the provisions of Sections 19 and 22? Perhaps a formal standard Notice to Attorney is the only viable method to ensure that the attorney is made aware of accounting obligations upon the donor's incompetency. Such a notice would also make the attorney aware that they have a legal obligation to continue to act upon the donor's incapacity.

C. STANDARD OF CARE/ATTORNEY COMPENSATION

With respect to the skill the attorney must bring to the task of administering the financial affairs of the donor, the Manitoba legislation draws a distinction between an attorney who is to receive compensation for acting and one who is not.

Section 19(2) of the Act specifically provides that the attorney who is not to receive compensation shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in the conduct of his or her own personal affairs. Section 19(3) provides that the attorney who is to receive compensation shall meet a higher standard of a person who is in the business of managing the property of others.

Although there is no standard form of power of attorney for the Province of Manitoba, many precedents now in use contain a provision whereby the donor can set out a fee schedule that permits the attorney to charge a fee for the services performed. It must be remembered that in contrast to the appointment of an executor, where the time frame for work performed is somewhat compressed (the executor's year) and the need for professional assistance is a virtual certainty (lawyers, accountants, tax returns to file, etc.), the powers of attorney's role may extend over many years and the need to retain professionals is not as pressing or immediate.

The selection of the attorney as opposed to the selection of an executor may also be perceived as less a matter of selecting a candidate who has the proper skill set as opposed to a candidate who is simply available or convenient.

All of these contingencies lead potentially to a conflict over not only the standard of care brought to the task by the attorney, but whether compensation is appropriate.

There are two Manitoba decisions that touch on the issue of attorney compensation. Both decisions are issued by Master Harrison.

In *Re Colvin*, *2006 MBQB 229* the attorneys were appointed approximately eight years prior to Mrs. Colvin's passing at age 96. The power of attorney allowed for compensation for the attorneys. After Mrs. Colvin passed away, two of the three attorneys, (the third one being the co-executor, did not seek compensation as an attorney), sought compensation of $59,600.00 for the services performed prior to the deceased passing under the power of attorney.

The case is important as it highlights the need for the attorney to understand precisely what work he or she is performing under the power of attorney and what actions arguably are outside the scope of the power of attorney.

The evidence before the court indicated that the attorneys were assisting Mrs. Colvin with her shopping, cleaning, travelling to and from appointments, etc. Mrs. Colvin was their aunt, and living in the same building permitted them to provide her with assistance with

her day to day living requirements. According to the evidence, they dedicated at least two hours per day to this task.

The attorneys calculated the number of hours they had spent looking after their aunt at $10.00 per hour and advanced a claim of $59,600.00. In addition to doing all of her banking, paying her rent, looking after her investments, paying her insurance, etc., they also took care of her prescriptions, delivering them to her and ensuring that she took the medication at the proper time. They kept her company when she was lonely, got all her groceries, her mail and made extra meals for her. They would shop for her clothes, do her laundry and cleaning. These tasks were performed over a period of 8 to 10 years.

Master Harrison noted that at no time during this period did the attorneys ever make a request for payment. Mrs. Colvin was mentally competent until she passed away yet at no time did they request payment or compensation for the work being performed. Master Harrison noted that while many of the tasks performed, i.e. the financial management aspects of the relationship were "pure" power of attorney functions, many other tasks the attorneys performed were simply part of Mrs. Colvin's daily living regime.

The court referred to an earlier decision of Master Lee, *Flatt Estate* v. *Flatt*, *1997 M.J.No.84* where a distinction has been drawn by the court between the management of a person's financial affairs and the management of their daily living requirements. Master Lee had concluded that he was not satisfied that there was a presumption at law that a family member acting under a power of attorney does so gratuitously and a stranger is entitled to compensation. However, the question that must be addressed by the court is whether the service provided is "worthy" of compensation.

Master Harrison in *Colvin* pointed out that while assisting someone to attend their doctor's office, purchasing prescriptions or groceries or doing housework is certainly commendable, there is no evidence or case law to suggest that compensation to an attorney should be awarded for such tasks. Master Harrison did award compensation in the sum of $7,500.00.

It should be noted that the issue of compensation is only touched upon in *The Powers of Attorney Act* in the context of standard of care [see section 19(2) and section 19(3)].
Master Lee, in the *Re Nichol Estate*, (1996), 112 M.R. (2nd) 35 granted compensation on a *quantum meruit* basis for the work performed by the executor while acting under a power of attorney prior to the testator's passing but specifically stated that in the absence of clear direction in the power of attorney or from the donor, the attorney was not entitled to compensation for work being performed.

D. ACCOUNTING

As noted above, the attorney is often left to his or her own devices once the request has been made that he or she assume the responsibilities as attorney. Attorneys do not routinely consult counsel as to precisely what records have to be kept and in what form until the passage of some time and, more than not, until the donor has passed away.

The issue of the preparation of accounts was considered by Justice Clearwater in *JL* v. *SLL*, 2006 MBQB 170. As reviewed in The Companion Paper, Justice Clearwater removed the attorneys and appointed the Public Trustee of Manitoba in their place.

With respect to the issue of an accounting prior to their father's incapacity in July 2003, Justice Clearwater indicated no further accounting was required prior to incapacity and the application for same was dismissed.

Justice Clearwater ordered "to the extent necessary" that the power of attorney be amended so as to require the Public Trustee of Manitoba to provide the children with an accounting or statements of account once annually. If the children were not satisfied with the accounts of the Public Trustee, they may take further action as they may be advised.

Justice Clearwater ordered that the accounts follow as closely as possible the form and content contemplated and provided in Queen's Bench Rule 72 (except for the requirement with respect to an initial inventory).

Proceedings commenced under section 72 of *The Mental Health Act* and Rule 72 of the Court of Queen's Bench Rules are far more structured and unforgiving that arguably what is contemplated under *The Powers of Attorney Act* and the self-help remedy contained therein.

It must be remembered that committeeship proceedings under *The Mental Health Act* are accompanied by affidavits of the applicant and two doctors. The court appointing a committee closely scrutinizes the evidence presented to it and requires precision with respect to the preparation and presentation of accounts.

Specific forms are provided whereby the particulars of the accounts must be listed including an opening inventory, statement of money received, statement of moneys disbursed, statement of assets sold or realized and assets acquired, along with a reconciliation and closing inventory. Appropriate exhibits must be attached to the affidavit to support the accounting provided.

Section 72(2) of *The Mental Health Act* provides that the Public Trustee must be served with all committeeship applications and supporting material. For committeeship passing of accounts, either next of kin or the Public Trustee will be provided with the accounts for review. The accounts must also be approved by a Master.

The distinction between a *Mental Health Act* application to approve accounts and the providing of accounts under a power of attorney is that the guidelines, rules and responsibilities are typically made known to the committeeship applicant before any steps have been taken to control or manage the individual's property who suffers from a mental incapacity.

As noted in the *EB v. SB and BK* case examined in The Companion Paper, the attorney BK had not maintained accounts of the estate of her incapable mother from the point of incapacity. The attorney also failed to produce accounts upon the formal request by the applicant EB and up to the time of the hearing. Finally and as recorded in the factual background of the case, Justice Burnett identified that the attorney proposed distributions to herself and to EB from their mother's funds. Justice Burnett indicates that SB is removed as attorney in part for her failure to provide an accounting.

In accordance with the duties and obligations of attorneys as listed by Mr. Justice Clearwater in *JL v. SLL*, one of the key obligations of an attorney is to be able to account for management of the property of the donor. Since the attorney is accounting directly to the donor while the donor has capacity, the accountability issue will typically remain a private matter between donor and attorney.

During a period of incapacity, it is recommended that an attorney not only specifically identify when the incapacity triggers the heightened obligations, but also that the attorney maintains accurate accounts for all periods thereafter and also maintains all supporting documentation as working papers for the accounts until the attorneyship is terminated. As shown in the Manitoba case law, attorneys may be called upon to account back for many prior years if the court determines that such is in the best interests of the donor.

Finally, if there is doubt as to capacity of the donor, good records that can easily be converted into accounting schedules are a solid precautionary step.

E. OTHER NOTABLE CASES RE: ACCOUNTING PRINCIPLES

Undue influence and the presumption of resulting trust triggered by the fiduciary relationship as between attorney and donor is a recurring theme in cases where attorneys allegedly receive gifts from the donor while a power of attorney is in existence. As noted in The Companion Paper in the *EB v. SB and BK* decision, Justice Burnett addresses this issue as a result of BK having received gifts from her mother while the power of attorney was in existence, although BK took the position that she did not use the power of attorney to make the gift in question.

Justice Burnett refers to the Manitoba Court of Appeal decision in *Kibsey Estate v. Stutsky* [1990] M.J. No. 112, citing that court's description of the onus and the standard of proof to prove a gift. It is clear that the onus is upon the gift recipient to prove a valid gift *inter vivos*. The recipient must establish a clear and unmistakable intention on the

part of the donor to make a gift. Otherwise, the gift will fail and the attorney will be accountable to the donor's estate for the value of the alleged gift.

In the *EB* case, Justice Burnett noted that because the donor was incompetent at the time of hearing,

> "… the proof of the gifts must necessarily come from BK or must be found or inferred from other evidence including SB's conduct post gift. … As was the case in **Kibsey Estate**, *supra*, while I started with a suspicion about the validity of the gifts, on the totality of the evidence before me and my assessment as to the credibility of the witnesses, I believe that SB made the gifts to BK as a result of "her own full, free and informed thought".

This issue is also considered by Senior Master Lee in the Master's reference report for the passing of accounts for the estate and the passing of accounts for the power of attorney in the decision of the *Estate of Marjory Veva Louise Hartley* 2008 MBQB 2002. With reference to the legal issue as to the specific nature of the relationship between the donor and attorney under a power of attorney at issue in the passing of accounts, Senior Master Lee comments:

> Normally the execution of a power of attorney creates an agency relationship between the donor and the attorney. There is a fiduciary relationship established between the principal, being the donor of the power of attorney, and the agent, being the attorney pursuant to the power. However, there is authority which suggests that, in the case of an enduring power of attorney, the relationship changes as soon as the donor lacks capacity. There appears to be a higher duty on an attorney acting under an enduring power of attorney following the event of the donor's incapacity. The attorney is no longer acting strictly as agent but as trustee. In *Agency Law Primer 2nd edition*, Cameron Harvey *1999 Thomson Canada Ltd.*, there is a quote from **Banton v Banton** (1998), 164 D.L.R. (4th) 176 (Ont. Gen. Div.) at pp. 239-240. This quotation is found at page 150 of the *Agency Law Primer* and reads as follows:
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> > An attorney for a donor who has mental capacity to deal with property is merely an agent and, notwithstanding the fact that the power may be conferred in general terms, the attorney's primary responsibility in such a case is to carry out the instructions of the donor as principal. As an agent, such an attorney owes fiduciary duties to the donor but these are pale in comparison with those of an attorney holding a continuing power when the donor has lost

> capacity to manage property. In such a case, the attorney does not receive instructions from the donor except to the extent that they are written into the instrument conferring the power. The attorney must make decisions on behalf of the donor … The status of such an attorney is much closer to that of a trustee than an agent of the donor. This has been the case since the *Powers of Attorney Act* was amended in 1979 to permit the creation of such powers. It is now made explicit in [ss. 32 and 38] of the *Substitute Decisions Act, 1992* … and [other sections] including those dealing with the standard of care, the ability to seek the directions of the court's power to remove the attorney, the right to compensation and the rules relating to the passing of accounts.
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> [It was] implicit in the provision of the *Powers of Attorney Act* … [Such attorneys owe] in my view, the same, or similar, duties of loyalty, prudence, and good faith as trustees and, in the event of their breach of such obligations, they would have been subject to the control and supervision of the court.
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> Perhaps the most striking difference between the position of an attorney under a continuing power and a trustee is that, while it is usual for the powers of the latter to be dealt with specifically, and, in different respects, circumscribed by the provisions of the trust instrument, an attorney's powers are generally defined with complete generality as was the case in the document executed by George Banton. … Another difference is that a trustee will most commonly – although not always – have obligations to manage the property for the benefit of more than one person. The attorney's fiduciary obligations are owed to the donor.

Senior Master Lee, while making reference to the legal issue, and including this commentary, does not make a finding with respect to the particular facts in the *Hartley* case on the issue, but indicates that it is a matter to be referred back to a judge for trial. The *Hartley* decision is also useful for the court's review of a variety of improper actions by the attorney, and for which the attorney is required to account pursuant to Senior Master Lee's order.

The presumption of resulting trust, triggered by the fiduciary role of an attorney and the relationship of dependency as between attorney and donor has also been examined in the cases of *McNabb Estate v. Mills*[1] and *Dell'Aquila Estate v. Mellof*[2]. In these cases, the courts examine the particular gifting transactions and the evidence to determine if the presumption of resulting trust can be overturned. As noted by Laing, J. the Saskatchewan Court in the *Mellof* decision, references the Privy Council case of *Inche Noriah v. Shaik Allie Bin Omar* [1929] A.C. 127, which decision contained the principle that "the most obvious way to rebut the presumption of undue influence once a confidential or dependent relationship is established, is that the transaction was explained to the donor by some independent and qualified person to ensure that the donor was free from such influence and had a full appreciation of what he/she was doing". In *Mellof* the Justice found that "it would have been very easy for the defendant to have arranged independent advice for Mr. Dell'Aquila. Indeed this was also his obligation as power of attorney if he wished to accept such gifts while standing in a fiduciary relationship to Mr. Dell'Aquila".

The presumptions of undue influence and resulting trust triggered by the fiduciary relationship between donor and attorney also applies to the holding of joint accounts as between donor and attorney. While the attorney may have legal title and control of the balance of funds in a joint account upon the death of the donor, the principle of resulting trust is applied unless the attorney can establish that he/she was to receive the balance of funds in the account as a gift.

Another ongoing theme with respect to attorneys' duties and obligations relates to the consequences of the inability to account for the management of the donor's property. In the decision of *Re: Lefebvre (Estate of)*[3], Gill, J. of the Alberta Court of Queen's Bench makes a clear distinction between the periods when the donor was capable versus the period of incapacity with regard to the duties and obligations of the attorney. Numerous problems were examined, arising by the failure of the attorney to act with due care and skill in the management of his mother's property, as well as breach of his fiduciary duties to act with honesty and integrity and only in the best interests of the donor when dealing with her property.

The Alberta Court in *Lefebvre* makes clear that where the attorney cannot produce records or any explanation with respect to discrepancies in the accounting of his mother's property during her period of incapacity, the attorney is obliged to repay to the estate those sums of money. The same result issued in the *Hartley* accounting reference in Manitoba where the attorney could not account for assets.

An extensive review of the standard of care and application of the fiduciary duty test for attorneys is contained in the recent Alberta Queen's Bench decision in *Taubner Estate (Re)*[4]. The Alberta Court examines the duties of a son acting as attorney for his elderly incapable father in a commercial transaction for the purchase of shares in a privately held

[1] 1995 CanLII 160 (B.C.S.C.)
[2] 1996 CanLII 6755 (SK.Q.B.)
[3] 2007 ABQB 195
[4] 2010 ABQB 60

lucrative family business. The court also considers the application of the "saving provisions" of the Trustee Act of Alberta where a trustee may be excused from a breach of trust where they acted honestly and in good faith. (In Manitoba: *The Trustee Act* C.C.S.M. c. T160, s. 81).

Finally, the *Taubner* decision deals extensively with consideration of the proper processes to be used by beneficiaries to assert rights / challenge actions of attorneys. Mr. Justice Graesser in *Taubner* makes it clear that any actions as against an attorney are actions on behalf of the estate, and that beneficiaries have no direct cause of action against attorneys. As to remedies, the court in *Taubner* references the fact that the duty of an attorney "to account" includes remedial action for repayment to the estate, and is not limited to production of physical accounts by an attorney. This is in keeping with decisions whereby attorneys have been required to repay the estate for losses suffered by the estate due to their negligence or breach of fiduciary duties in the carrying out of their responsibilities as attorney.

F. COSTS

If an attorney is involved in litigation and called to formally account, the attorney is entitled to be reimbursed for legal fees on a solicitor and client basis assuming they have done the proper job and their position is supported upon hearing.

In the decision of *Porter v. Henry* 2006 MBQB 218, Justice Jewers in addressing the issue of costs payable to a committee adopts the application of the principle identified in *Thompson v. Lamport* (SCC) and applies the full reimbursement cost principle to a committee acting as a trustee upon the passing of accounts of the committeeship:

> A committee is not, strictly speaking, a trustee, and the position has been described as being more akin to that of a liquidator. See *In re E. G.*, [1914] 1 Ch. 927. However, I would define the position as being analogous to that of a trustee. Section 4 of *The Mental Health Act*, S.M. 1998, c. 36 – Cap. M110 (the "Act"), provides that a committee of property shall take into her custody or control all of the incapable person's property that is subject to the committeeship order and then may "manage, handle, administer and otherwise deal with the property in the same manner as the incapable person could if he or she were capable". The property is to be controlled by the committee and is to be dealt with on behalf and for the benefit of the incapable person. Indeed, s. 4 of the *Act* stipulates that a committee of property is a fiduciary whose powers and duties must be exercised diligently, honestly and with integrity and in good faith for the benefit of the incapable person. This is surely comparable to what is required of a trustee in law.

In *Thompson v. Lamport*, [1945] S.C.R. 343 at p. 356, there is the following:

> … The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly.

In like fashion, it will be appropriate for an attorney as trustee of the donor's estate to be fully compensated for carrying out this aspect of the duty if a formal accounting is required. If an attorney has caused the problems leading to the requirement for a court application and a contested passing of accounts, the attorney may receive partial costs or may be required to bear their own costs.

Further, where an interested third party who is not designated as an accounts recipient under a power of attorney brings forward a meritorious case to the court on a challenge of the attorney's actions, they may be awarded costs as a successful litigant. In the *EB* case, Justice Burnett granted costs to EB; the reasons for decision were silent on costs to the attorney BK and presumably therefore no costs were allowed to BK.

What level of cost recovery should be available to a designated accounts recipient if an attorney provides accounts to the designated recipient and the recipient identifies questionable activities or evidence of improper accounting? Arguably, on an extension of the principles in *Thompson v. Lamport*, a designated recipient should not bear any of the expense of acting upon the information pursuant to the designated role set out by the donor upon the donor's instructions. In such a case, it may be appropriate for a designated accounts recipient to be reimbursed on a solicitor and client basis.

It is also important to note that costs are more easily defined in an action brought by statement of claim, in accordance with the Queen's Bench Rules tariff than upon an application for passing of accounts. Other than the full reimbursement principle identified above arising from the decision in *Thompson v. Lamport*, it is difficult to discern a clear rationale from various decisions which have awarded costs to participants in contested passing of account matters, whether those findings are in death estate cases, committeeship cases, or contested power of attorney estate management cases.

What do we tell our clients about legal fees and costs in these situations?

Based on the above principles, a lawyer ought to make clear to his client that the retainer is a personal contract between the individual and the law firm, whether the individual seeks services in the role as attorney, designated recipient, or nearest relative of a particular donor. Recovery of costs on the application of costs principles in litigation is a

separate matter. As noted above, legal fees arising in attorney litigation may be found to be properly and fully borne by the estate for attorneys but that is not guaranteed. Lawyers may wish to make it clear to their clients that their obligation to pay fees remains and is separate and apart from any court finding respecting costs.

G. LEGAL ADVICE/ROLE OF THE LAWYER IN POA DISPUTES

We propose the following for consideration as to the principles a lawyer may want to consider depending upon who arrives at the lawyer's door for advice and direction.

If retained by an attorney under power of attorney, the lawyer should carefully consider the existing issues including whether the attorney has properly carried out their duties. On request for an accounting by a third party, the lawyer should consider with the client who is requesting the information and why. The attorney should be acting in the best interests of the donor and should consider balancing the interests of maintaining confidentiality of the donor's property and personal information as against the big picture circumstances with respect to the request for an accounting. Is the donor competent, or does that issue need to be formally addressed and determined as part of the inquiry?

If the lawyer is retained by a designated accounts recipient, and it appears the donor is incompetent, along with requesting an accounting the recipient should seek to be provided with formal notice as to when the attorney commenced using the power of attorney and as to a date when the donor became incapable, as well as evidence to support the specific date identified.

Finally, if the lawyer is retained by an interested party, and no one else is taking action to obtain an accounting with serious issues having been identified, Manitoba case law appears to indicate that the designation of the individual as an interested party is available. If the designation is made by the court under the *Powers of Attorney Act* to identify a person as an interested party, it is submitted that the interested party then ought to request the same information identified above as may be requested by a designated accounts recipient.

It is incumbent on counsel to explain the rights and obligations of all of the players in a given situation, so that the best interests of the donor are protected and to facilitate appropriate disclosure specifically focussed on the property management issues.

Where an ongoing dispute exists which will require resolution by the litigation process, it is suggested that counsel may be effective in facilitating the narrowing of issues before a contested application proceeds. Consider whether a trial of issues is necessary and if oral evidence is necessary.

As noted above, the costs of a contested application or trial will not necessarily be covered for any party. Finally, for consideration of the reader the following quotation is drawn from the conclusion in *Taubner*, within the context of the best approach to minimizing litigation:

> Attorneys and trustees are well advised to seek advice or direction from the courts at an early stage of any conflict. Such a process provides comfort and security for all concerned. This dispute has festered for over 10 years. Had that process been used here, this litigation might have been avoided. Similarly, the stonewalling approach to Ms. MacDonald's inquiries fuelled the flames of distrust within the family. On the evidence before me, there was no valid reason for the stonewalling, or for anyone to fear the results of an application for advice or directions.
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> Attorneys and trustees are also well advised to consider the nature of the duties they are expected to perform, and the environment in which the duties are to be performed. I did not apply hindsight to inform the results of this case, but hindsight is a valuable tool for others to learn from. The seeking of advice or directions should be a common-place practice when major decisions are made by attorneys and trustees, if the attorneys and trustees want some comfort that they are doing the right thing, and that they will not be held liable later when hindsight suggests they made a mistake.