The Duty of an Attorney to Account

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As a general rule, a person exercising a power of attorney for property in Ontario has no legal duty to account to anyone other than the grantor of the power, where there are no reasonable grounds to believe the grantor is incapable of managing property.

However, even if certain that the grantor would never require an accounting, anyone exercising a power of attorney should be very careful to ensure they will be able to account in the future to a person adverse in interest.

If the grantor dies and the attorney is then appointed trustee for the grantor's estate, the court has a discretion to require the former attorney/estate trustee to account to a beneficiary of the estate for the period of time they were acting under the power of attorney.

This was the conclusion of the Ontario Superior Court of Justice in *McAllister Estate v. Hudgin* released in August 2008. The court ordered the deceased's daughter, who was estate trustee and had also been the deceased's attorney, to account to her brother, a beneficiary of the estate, for the period of the power of attorney despite the daughter's objection and despite the fact that the there was insufficient evidence to raise a concern about the deceased's capacity to manage her property up until death. (The order provided that formal estate accounts were not required, "at this stage", only production of certain financial records.)

The court ruled that where the grantor is deceased and the attorney and the estate trustee are the same person, (and therefore there cannot be a true accounting between attorney and estate trustee), the court can exercise a discretion to require an accounting after considering two main questions: (1) the extent of the attorney's involvement in the grantor's financial affairs, and (2) whether the applicant has raised a significant concern in respect of the management of the grantor's affairs that warrants an accounting.

In the *McAllister* case the evidence was clear that the former attorney had "complete control" over the deceased's finances. Also the applicant brother had raised a "significant " concern in that on a calculation of the deceased's known income and expenses there should have been approximately $100,000 more than there was in the deceased's account as of the date of death.

The court based its jurisdiction to make this order on two grounds: s. 42 of the *Substitute Decisions Act* which gives the court the power to order the accounts of an attorney to be passed on the application of "any" person, and alternatively, the court's general powers in respect of directions in Rule 75.06 of the *Rules of Civil Procedure*.

There are other recent instances where an attorney/estate trustee has been compelled to account other than to the grantor.

In *Bigelow* (July 2008), the estate trustee did not dispute that the former attorney who was also the estate trustee should account to a beneficiary for the period the power of attorney was exercised. This was an application by the estate trustee to pass the Estate accounts. An objection filed by one of the deceased's children focused on the "opening balance" of the accounts at the date of death. The objector complained about expenses during the exercise of the power of attorney.

The estate had willingly produced documentation for the attorney period and made a "concerted effort" to answer the objector's

requests for information. The objector argued these answers were inadequate. A three day hearing ensued which focused on the alleged depletion of the deceased's assets during his life, including gifts to family members, cash withdrawals without supporting documentation, lack of receipts for expenses reimbursed to the attorney, and certain charges to the grantor's credit card accounts. The court entertained the complaints, but held the objector's suspicions were unfounded and that his investigation "revealed nothing to justify any finding of impropriety or breach of duty of any kind" by the attorney. An appeal is pending.

Another recent case in which an attorney who became estate trustee was ordered to account to a beneficiary for the period of the power of attorney is *De Zorzi Estate v. Read* (March 2008).

The wisest course for a person exercising a power of attorney for property in Ontario following these decisions is to assume that he or she will be required at some point in the future to account to persons opposed in interest, and to conduct themselves accordingly throughout their tenure as power of attorney. They may also want to ensure, if they can, that the document naming them as attorney provides protection for the costs they may be forced to incur in preparing accounts and passing them before the court.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035