

Attorneys Beware!

If you have been appointed power of attorney, or if you are considering who to appoint as your own attorney, it is important to understand the associated responsibilities to be fulfilled and when the role comes into effect. The *Fareed v. Wood* [2005] O.T.C. 526 (SC) court case highlights the importance of ensuring an attorney knows and understands all associated responsibilities.

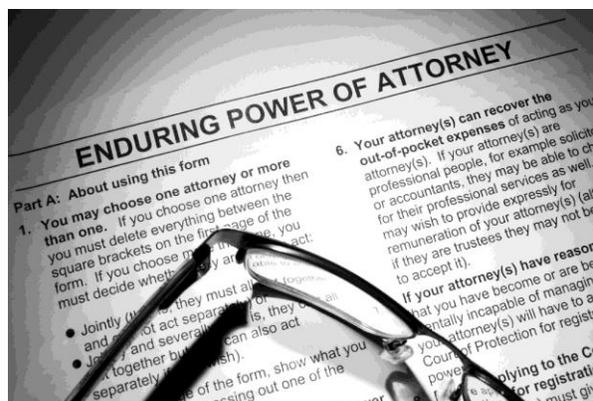
In 1992, a woman (“McLeod”) appointed her solicitor (“Wood”) as her power of attorney for property. The court found Wood commenced his duties as attorney in 1992, even though evidence suggested McLeod continued to handle payment of her expenses until 1996, when Wood took over that responsibility. During the time when McLeod was still writing cheques, a considerable amount of money was transferred to Ms. Paul. The court considered these transactions to be suspicious, given the amounts and McLeod’s age. Wood did not provide any explanation for the amounts transferred – he merely recorded the payments.

McLeod died in 1999. McLeod’s Will provided for various bequests and legacies, including \$50,000 to McLeod’s step-daughter (“Fareed”) and \$5000 to each of Fareed’s children. The remainder of the estate was to be transferred to the Kitchener-Waterloo Hospital Foundation. In 1992, McLeod’s estate was worth approximately \$340,000. At the time of her death, the estate was worth approximately \$4,000.

In 2001, Wood was ordered by the court to pass accounts for the time during which he acted as attorney for McLeod. The report was filed in September 2002 and indicated a substantial number of transactions were “unidentified”. The case proceeded to court to deal with various issues including whether Wood was in breach of his “fiduciary duty as a solicitor and attorney” and whether Wood was liable to the estate.

With respect to fiduciary duty, the court ruled “it is clear Mr. Wood commenced his duties and responsibilities as Ms. McLeod’s attorney in April 1992, at the very least...” The judge went on to state “in my view, Mr. Wood did not meet the requisite standard of an attorney and, therefore, I find he was in breach of his fiduciary duty.” The court ordered the compensation previously paid to Wood was not approved, and Wood was directed to reimburse the estate for approximately \$130,000.

Justice Gordon, in his decision, stated “it is not uncommon for a grantor to retain the ability to attend to some functions while directing the attorney to perform others. In some respects, it allows for a transition period as the grantor adjusts to changes in life resulting from age. The separation of responsibilities can co-exist, however, the attorney assumes full responsibility of all financial activities once he or she assumes some duties. In my view, the attorney cannot avoid liability by simply saying the grantor paid or transferred her own funds to another. The attorney is responsible for the accounts from the outset.”



Wood’s responsibility to McLeod and her estate began as soon as he commenced acting as attorney, even though McLeod continued to maintain her own accounts for a time.

Individuals who have been named attorney should be aware of their responsibilities with respect to proper accounting and accountability and take steps to educate themselves. A contingent enduring power of attorney (where available under legislation) may address some of the concerns as to when an attorney’s duties commence.

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