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LEGAL UPDATE

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CONTINUING POWERS OF ATTORNEY FOR PROPERTY

Introduction

For many years clients of our office have been asking us whether or not they should have a power of attorney appointing someone to act for them if they should become incapable of making decisions for themselves. Many were acting out of concern that if they failed to do so, "the government would take over" and they were afraid that the "government would take everything".

Although, this fear may not be justified, our answer was (and is) "Yes". The reason is not that the government would take over but because if a Power of Attorney was not appointed and a person became mentally incapable of looking after their affairs, the Public Guardian and Trustee would become the statutory guardian of the person's property unless or until someone else applied to the Court to be appointed the statutory guardian of property. It is much easier and less expensive to appoint someone in advance.

Types of Powers of Attorney

There are two basic types of powers of attorney. The first is a power of attorney to do business known as a "continuing power of attorney for property". The second is a "power of attorney for personal care" wherein someone is appointed to make personal care decisions including decisions about health care, if the person is not able to make them himself. This Legal Update deals only with continuing powers of attorney for property. For more information about Powers of Attorney for Personal Care please refer to our Legal Update entitled "Powers of Attorney for Personal Care".

Terminology

A person who makes a power of attorney appointing someone to act on his or her behalf is referred to in this Legal Update as the "grantor". A person who is appointed to act on behalf of the grantor is called the "attorney". This person is not the grantor's lawyer but rather the person appointed to act for him.

The power of attorney itself is sometimes referred to as the "power".

Historical Note

The law dealing with powers of attorney is based on the common law of agency, which is founded in the law of contract. Essentially, a person would appoint another to act as his agent (or attorney) to do a job for him. The instructions were contained in a document known as a power of attorney. The appointment was similar to a listing agreement appointing a real estate broker to sell property.

A power of attorney could consist of three or four legal size pages of fine print outlining the attorney's powers. If something was omitted, the attorney had no power to do it. Persons dealing with the attorney had to examine the power to ensure the attorney had the authority to do what he was doing. If the power was not in it, both the attorney and the person with whom he was dealing acted at their own risk. The grantor could take the position that the action was not authorized and refuse to honour it. The documents became very cumbersome to deal with.

Another problem was that if the grantor became incompetent, the incompetency had the effect of revoking the power of attorney. Sometimes banks and other financial institutions continued to honour powers of attorney when the grantor had become incompetent, but that was always on an informal basis. If the bank was formally advised of the incompetency the bank would stop acting on it. If that happened an application had to be made to the Court to appoint someone to do business on behalf of the grantor.

In 1979 the Province of Ontario took a first step to reform the law. It passed the *Powers of Attorney Act*. It did two things. First, it reversed the law that said an attorney had only those powers that were specifically granted to him. It said that if a "prescribed" form of power of attorney was used, the attorney had **all** of the powers that could lawfully be given to an attorney. If the grantor wished to restrict those powers, the restrictions had to be specified in the document granting the power of attorney.

The second change was that if the prescribed form contained special words, it would remain in force if the grantor became mentally incompetent.

The combination of these two provisions solved the two problems referred to above. A restriction was normally inserted in the document that it was not to come into force unless the person granting it became incompetent. The grantor could continue to do the day to day business until such time as the grantor became incompetent (hopefully never). If the grantor became incompetent, the attorney, who was a person in whom the grantor had confidence, could take the grantors' place and do the grantors' business.

While the Act solved two of the problems created by the common law, there were others that it did not consider. The legislators failed to realize that in changing the law, the attorney was no longer a "contracting" party and was now a "trustee" acting in a "fiduciary" capacity. The Act required the attorney to account for the money received and spent, but the attorney had that obligation under the former law of contract. Because of the "fiduciary" relationship, the property of the incompetent could only be used for the benefit of the incompetent. That created an obvious problem where, for example, one spouse was acting as attorney for the other, and needed the money from both for their mutual support. In law, the spouse could not use the money of the incapable spouse for her own support. Obviously it was used, but such use was not authorized in law.

Another problem was that there was no incentive for an attorney to act, or, once acting, to continue to act. The legislation did not provide for compensation for the attorney. Under the former law of contract, the compensation was arranged by contract between the parties. This did not create a problem if one spouse was acting for another. It did cause problems in other cases. The question was asked "If I am not paid, why should I bother?".

In an attempt to resolve these problems, the government introduced a package of legislation including the *Substitute Decisions Act, 1992*. It came into effect on April 1, 1994. It resolved some of the problems created by the 1979 legislation. There is no longer a need to use a "prescribed"

form. The result is that similar powers of attorney from other provinces are now recognized in Ontario. A spouse acting for an incompetent spouse can use the money for her own support. A schedule of fees was established to compensate attorneys for acting.

Capacity to Give a Continuing Power of Attorney

The Legislation sets out when a person is capable of giving a power of attorney. The Legislation in Section 8 says that the grantor must

a) know what kind of property he or she has and its approximate value;

b) is aware of obligations owed to his or her dependants;

c) knows that the attorney will be able to do on the persons behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

d) know that the attorney must account for his or her dealings with the persons property;

e) knows that he or she may, if capable, revoke the continuing power of attorney;

f) appreciates that unless the attorney manages the property prudently its value may decline; and

g) appreciates the possibility that the attorney could misuse the authority given to him or her.

A continuing power of attorney is valid if the grantor, at the time of executing it is capable of giving it even if he or she is incapable of managing their own property.

The focus of this Legal Update now shifts to the document itself.

Selection of an Attorney

The legislation has solved many problems, but there are two problems that it cannot solve. These are (1) the grantor must appoint an attorney who is willing to act; and (2) the need for an attorney who is completely honest.

The first problem can be resolved in most cases by talking to the proposed attorney in advance and obtaining that persons agreement to act. It is possible that the attorney who has been appointed may be unable or unwilling to act when the time comes, therefore the appointment of an alternate attorney should be considered.

The grantor must be convinced of the honesty and integrity of the attorney being appointed in order to resolve the second problem. Regulations under the Act require the attorney to give a copy of the accounts to the attorney for personal care on request. If the attorney for personal care is a person other than the attorney for property, any concerns with respect to the honesty of the attorney are reduced. This would be so if, in addition to the Regulation, the power of attorney itself requires the attorney to deliver copies of the accounts to other family members on a regular basis (perhaps each year).

Effective Date

Most people do not want a power of attorney to come into effect until such time as they become unable to conduct their own business. A restriction should be put into the document to that effect. If such a restriction is not included, the power of attorney will come into effect immediately.

It should also have a mechanism to trigger the date that it comes into effect. Normally this is a letter from the family doctor. In the absence of a

triggering mechanism, the legislation provides for an "assessment" of the grantor to be undertaken by authorized and trained assessors. That assessment can be expensive.

Revocation

One of the problems with a continuing power of attorney for property is that once it comes into effect, it will remain in effect until revoked. If it is revoked, it ceases to exist and cannot again be exercised in the future.

Accordingly if a person is mentally competent and wishes to leave his business affairs in the hands of another for a short period of time, a continuing power of attorney for property should not be used. A separate power of attorney for a specific purpose or for a limited time should be prepared.

An example would be a person authorizing a spouse to sign an offer to purchase of a property on his behalf if it has been listed and a sale might occur while he is out of the country. In these days of electronic communication, the use of powers of attorney for a specific purpose or for a limited time are becoming less common.

Compensation of Attorney

Regulations passed pursuant to the *Substitute Decisions Act, 1992*, provide for the following scale of compensation to be paid to an attorney.

a) 2.5 percent on capital and income receipts;

b) 2.5 percent on capital and income disbursements; and
c) two fifths of 1 percent on the average value of the assets as a care and management fee.

Nothing is said with respect to out of pocket expenses, but presumably, they would be paid in addition.

If the attorney takes compensation, the attorney is required to "exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise. If the attorney does not receive compensation for managing the property, the attorney is required to exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.

A person appointing another to act as the attorney may expect the attorney to take compensation. The grantor may also feel that the requirement that such person be as good as a professional money manager is too high a responsibility and reduce that responsibility to the "prudent person" rule.

The compensation awarded to an attorney does not include the cost of obtaining professional advice and other out of pocket expenses. The power of attorney should make provision for both.

Powers and Duties

While the *Substitute Decisions Act* provides that an attorney may "do on the grantor's behalf anything that the grantor could do if capable, except make a will", the governing legislation and regulations provide that an attorneys powers are subject to such legislation and regulations. These require attorneys to do some things and prohibit attorneys from doing others. The following list is intended as a guide. It is not a comprehensive list. If there is any question with respect to any item, reference must be had to the governing legislation.

1. The attorney must make reasonable efforts to determined whether the incapable person has a will, and if he has, what it contains. Persons having custody or control of the grantor's property must supply the attorney with any information requested and deliver such property to the attorney on request.

2. The attorney must take into account the effect

on the personal comfort and well being of the incompetent person and must be made in a manner consistent with decisions concerning his or her personal care.

3. The attorney must explain to the incapable person the powers and duties of the attorney and encourage the incapable person to participate in decisions about his or her property. There are obviously situations where this is impossible as well as situations where it is quite possible.

4. The attorney is to foster regular personal contact between the incapable person and supportive family members and friends

5. The attorney must try to determine whether or not the mentally incapable person has a will and if he does, determine its contents.

6. The attorney has power to require other persons holding property on behalf of the mentally incapable person to give him particulars of that property and any documents in his power relating to it.

7. The attorney cannot dispose of property that is specifically dealt with in a will unless it must be sold to raise the money needed to care for the mentally incapable person.

8. The property of the mentally incapable person should only be used for the benefit of the mentally incapable person, for the support of his or her dependants, and to satisfy his or her other legal obligations. The standard of living before the person became incompetent and the value of his or her property should be taken into account.

9. There are rules that deal with gifts and loans to friends and family and with charitable gifts that can and cannot be made. It is beyond the scope of this Legal Update to give full particulars of such gifts and loans.

10. An attorney has power to apply to the Court for directions on any question arising out of the management of the property of the mentally incapable person.

Standard of Care

A person acting as an Attorney must employ the "prudent person" rule of investing. This means that an Attorney cannot make investments that a normal, prudent person acting reasonably would not make. If they do make those types of investments and there is a loss, the Attorney would be liable in damages for breach of duty to make up the loss. If the Attorney has acted honestly, reasonably and diligently he may not be held responsible for that loss.

The *Substitutes Decisions Act, 1992* provides that someone who is receiving compensation for managing the property is to exercise the same degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise. This is a fact that would have to be taken into account in determining whether or not the Attorney wishes to be paid for services rendered. The Power of Attorney can include a term indicating that the Attorney can be paid if they so chose.

Obligation to Account

The legislation and regulations contain two provisions with respect to the accounts that must be kept by an attorney.

The *Substitute Decisions Act, 1992*, provides for a "passing of accounts" in the form provided for in the Rules of Court. It also provides that Regulations may be passed governing accounts. The accounts governed by the Regulation must be

delivered to the incapable person and to the attorney for personal care if requested by either of them. If other family members wish to receive copies of the accounts you can include a provision in your Power of Attorney. Reference should be made to the regulations in force at the time one is exercising a Power of Attorney to determine the current rules with respect to the accounting. At a minimum the Attorney would be required to list all of the incapable person's assets as of the date they took over managing their affairs as well as a detailed list of all of the activities, accounts, investments, monies paid out and liabilities discharged or incurred on behalf of the incompetent person.

Revoking a Power of Attorney

Once a power of attorney comes into effect, it remains in effect (unless it is for a limited period) until it is revoked. A person who is mentally capable has the power to revoke a continuing power of attorney whether or not it has been exercised. If it has not been exercised, care must be taken to ensure all copies of a revoked power of attorney are destroyed. If it has been exercised, care must be taken to ensure that all persons acting pursuant to the authority granted to the attorney are notified and that all copies in their hands are returned and destroyed.

Multiple Powers of Attorney

The *Substitute Decisions Act, 1992*, contemplates that a person is to have one continuing Power of Attorney for Property. If more than one exists the one with the latest date prevails. Through inadvertence a second continuing power of attorney can be signed which deals with only a specific asset and does not deal with the incapable persons entire estate. The most common situation where this could occur is when a continuing power of attorney has been signed at the lawyers office, but then to expedite the handling of affairs, a person may sign a power of attorney over a bank account at their local banking institution. If the power of attorney signed at the banking institution is dated later than the original power of attorney at the lawyer's office, that could have the effect of inadvertently revoking the original power of attorney. If you do not wish that to occur the grantor should include a clause in their power of attorney stating that they wish the general continuing power of attorney for property to continue in effect notwithstanding that they may sign a power of attorney at a banking institution to deal with a specific account.

Recommendation

While continuing powers of attorney for property are not a complete answer to dealing with the business affairs and property of a person who becomes mentally incapable, nevertheless, we recommend that all clients seriously consider making a continuing power of attorney for property to protect themselves and their family if they should become mentally incapable.

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