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The Continuing Power of Attorney for Property

A Continuing Power of Attorney for Property (often referred to as a POA) is an important part of estate and succession planning. When planning for incapacity, granting a POA to a spouse, adult child, family member, friend or a corporate trustee, can provide you with peace of mind knowing that in the event of your incapacity to make decisions and manage your financial affairs, there will be a trusted substitute decision maker (attorney) who is authorized to manage your financial affairs on your behalf.

The attorney acting under a POA for an incapable grantor must conduct himself or herself according to a standard of care akin to that of a trustee. This is a high standard, that of a fiduciary. To avoid traps, the attorney should obtain legal advice from an estates lawyer in the appropriate jurisdiction, prior to exercising a POA. The lawyer can assist the attorney in navigating through the difficulties that may arise and the grey area of personal liability into which the attorney may inadvertently stumble.

Liability

To avoid personal liability, the attorney must only act according to the duties listed in the *Substitute Decisions Act, 1992* ("SDA"). Generally, so long as the grantor has capacity to manage his or her financial affairs, the attorney should refrain from acting. The attorney is prohibited, at all times, from making testamentary dispositions (writing a Will, designating beneficiaries under a life insurance policy or a registered plan) on behalf of the grantor, and from acting in a manner that is self interested and contrary to the best interests of the grantor. The attorney's job is an onerous one. Some (but not all) of the duties are listed below. Specifically, the attorney, at all times, must:

- act with honesty, integrity, and in good faith
- keep proper records (according to SDA Regulations)

Useful Terms

- Attorney – the donee who acts under the Continuing (or Enduring) POA for Property
- Beneficiaries – named in a Will to receive an inheritance
- Capacity and incapacity – cognitive ability, or absence thereof, to meet legal tests defined at law
- Continuing Power of Attorney for Property – authority to be the legal representative of and make financial decisions for, someone else
- Donee – the person named in the Continuing (or Enduring) Power of Attorney for Property to receive the authority
- Estate litigation – challenge to validity of documents or transactions, after death of testator, in Estates Court
- Grantor – individual authorizing, in writing, someone else to act as a substitute decision maker (there is no transfer of legal or beneficial ownership of any property, only authority to make decisions)
- Heirs – biological kin of a deceased who have an interest in the deceased's estate, at law, as a result of the deceased having died without a Will
- POA litigation – challenge to validity of a Continuing Power of Attorney for Property or transactions using that authority, during lifetime of the grantor, in Estates Court
- Testamentary disposition – transfer of property as a result of death by way of a Will or beneficiary designation
- Testator – person who signs his or her Will

- act in a manner that will benefit the grantor, and the grantor's dependants
- act according to the known (or ought to have been known by the attorney) wishes of the grantor (actions must not contravene the Will unless economically required)
- encourage the grantor's participation in decision making
- involve close family members and friends in the grantor's life
- refrain from acting in a self interested manner (examples of prohibited actions: borrowing grantor's money, making gifts to self or immediate family of grantor's money or other assets, transferring to joint tenancy with self)
- maintain confidentiality of all records and accounts of grantor (except from grantor)
- obtain grantor's consent to undergo capacity assessment/s, if assessment/s desired
- know the terms of the grantor's Will and other testamentary documents (beneficiary designations) and not do anything that is contrary to the known testamentary intentions

Corporate Governance

Often a grantor is the sole director of a private corporation. Once incapable, the grantor can no longer perform his or her director functions. It is assumed by some that the attorney is authorized by the POA to act as director. This assumption is misguided. The attorney steps into the shoes of the grantor as owner of the shares (the property interest of the grantor in the corporation). As a substitute decision maker shareholder, the attorney has the authority to sell, transfer and vote on the shares, on behalf of the grantor. This means that where the grantor is the sole shareholder or, with the consent of other shareholders (and, subject to a Shareholders' Agreement, if there is one), the attorney can, in his or her capacity as shareholder under the POA, elect himself or herself to be a director and act in that capacity.

Capacity

In addition to a legal age requirement, cognitive capacity is required at law, for certain acts or transactions to be valid and in effect. Different types of capacity are required for different types of acts or transactions. For example, each of the following acts – marrying, retaining and instructing a lawyer, revoking and granting a POA, making a Will, managing financial affairs, requires a certain type of cognitive capacity which, in very general terms can be described as the comprehension of the nature of the act and an appreciation of the consequences that flow from it. An individual may possess some but not all types of capacity, from time to time. For example, it is possible for an individual to have capacity to revoke and grant a POA while lacking capacity to make a Will, or to manage his or her property.

How does the attorney know whether or not the grantor has capacity to manage his or her affairs? Often, the attorney and family members seek the advice of a registered capacity assessor who conducts a capacity assessment according to the requirements under the SDA. Where litigation arises, the report is used as evidence, in court, in support of the presence or absence of capacity, as the case may be. However, the assessor's findings are not binding on the court.

Final Words

The attorney is bound by his or her fiduciary duty to only act in the best interest of the grantor, to encourage independence of the grantor, and to ensure that the grantor's property is protected. This is a difficult standard to meet, as there are often competing interests at play. It is recommended that in any event, an attorney who is contemplating exercising a POA, retain an estates lawyer for advice prior to exercising the POA.

Contact your BMO Nesbitt Burns Investment Advisor for assistance in finding an estates lawyer.

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