POWERS OF ATTORNEY FOR PROPERTY: A PRACTICAL GUIDE

MILTONS ESTATES LAW www.ontario-probate.ca

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THE PURPOSE OF THIS BOOKLET

The purpose of this book is to give you a basic understanding of the key issues related to powers of attorney **for property** in Ontario. Obviously, it is not legal advice and it is not a substitute for legal advice.

This booklet is not about powers of attorney **for personal care**. When used in this booklet the phrases “power of attorney”, “PoA” and “attorney” all refer to powers of attorney **for property** only.

All estate law is local, and of its time. This book is about the law of Ontario, as it stands in 2016. The law in other places can be very different. The law in Ontario will change.

This booklet is a high level summary of key principles in lay terms. It does not cover every situation, and it is deliberately written to be accessible and is not written in careful legal language.

Normally straightforward but rarely simple

For most people, preparing a Power of Attorney (a “PoA”) should be ‘straightforward but not simple’.

This little guide is intended to give you an understanding of the key issues related to preparing powers of attorney, the role of the attorney, and what to do if you think an attorney has abused their authority.

Who should have a PoA? Every adult who is capable.

If you are over 18 and competent to grant a power of attorney (see test below), there is no excuse for not making a PoA unless you have a strong desire to inflict an expensive mess on your family.

If you do not have a PoA then a court appointment of a guardian is required. The cost of a Court appointment of a guardian will usually be at least several thousand dollars in extra expense, not to mention significant uncertainty and delay.

KEY CONCEPTS

Competence

Competence is relevant to whether a person is capable of giving a power of attorney.

A person is competent to give a continuing power of attorney if he or she,

> (a) knows 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 person's 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) knows that the attorney must account for his or her dealings with the person's 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.

Incapacity

Capacity to manage property and its converse incapacity are relevant to when many powers of attorney come into effect ("kick in"), as well as a number of other issues. Competence is really a more nuanced form of capacity.

A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Note that the tests for **capacity** and **competence** are different. On occasion, a person may be competent to grant a power of attorney yet incapable of managing their property.

Continuing powers of attorney

Only a power of attorney that is "continuing" may be exercised by the attorney if the grantor has lost capacity. Regular powers of attorney that are not "continuing" PoAs cannot be used if the grantor is incapable. Clearly, for most estate planning needs, where the concern is about the grantor losing capacity during their lifetime (through, for instance, dementia), useful powers of attorney must be continuing powers of attorney.

In order for a PoA to be a continuing PoA it must clearly state that it is a continuing PoA or otherwise clearly convey that the grantor intends it to be effective even if the grantor is incapable.

THE BASIC RULES

Freedom of choice

The basic rule in Ontario is that a competent individual (see above) can grant a PoA to whomever they want, and the Courts will rarely over-rule this choice.

The attorney must be a competent adult – someone over the age of 18, who is competent to grant their own power of attorney (see above).

Undue Influence

The decision to grant a power of attorney must have been made by the grantor free from any undue influence by the attorney or any third party. Undue influence can occur when, for instance, the attorney uses fear, intimidation, or control over the attorney's movements or finances to coerce the attorney into granting a power of attorney to them. The facts are crucial. Thus, while a very helpful potential attorney might legitimately assist a grantor to find a lawyer, make an appointment and then drive the grantor to the appointment, a similar situation could be an indicator of undue influence of the grantor by a coercive attorney.

Continuing powers

There are very few formal requirements for powers of attorney. There are no magic phrases that they must contain. However, in order of a PoA to be a continuing PoA it must clearly state that it is continuing. This is crucial.

Proper signing

A power of attorney must be in writing and must be signed properly to be effective. It must be signed in the presence of two witnesses, and each witness must sign the PoA. The witnesses must be over 18 and must not be any of

- The attorney or the attorney's spouse or partner,
- The grantor's spouse or partner,
- A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child, or
- A person whose property is under guardianship or who has a guardian of the person.

CHOOSING THE RIGHT ATTORNEY

Choose carefully: an attorney has enormous power

Being an attorney is a demanding job that requires skill, integrity and judgment. It is not easy, or quick, or just a favour. An attorney has enormous power, and an incompetent or selfish attorney can do a lot of damage.

Choosing an attorney is not about choosing who is nicest or closest to you.

At the best of times being an attorney requires paperwork, keeping good records and handling forms and money. The attorney should be able to invest funds prudently, hire and instruct professionals like lawyers and accountants, open and close bank accounts, and complete and file tax returns. Make sure that you choose someone who has the right skills and aptitude.

Location

The attorney is not required to be resident in Ontario. In practice, however, it is easier if the attorney can be physically present fairly regularly.

If you have assets in more than one jurisdiction you should consider multiple powers of attorney, drafted in accordance with the laws of each jurisdiction and limited in scope to the assets in particular jurisdiction.

Compensation

Being an attorney is a demanding job. Being an attorney is not something one should do ‘as a favour’, nor ask someone to do ‘for nothing’. You should consider whether your attorney should be compensated for acting, and ideally address the issue one way or the other in the power of attorney document. If the compensation is not addressed in the PoA, the attorney can apply to the Court to be compensated. Currently, the general rule (which can be varied) is that compensation will be 3% of all capital & revenue receipts, 3% of capital and revenue disbursements, and 0.6% for annual care.

Avoid conflicts of interest

It is important not to choose an attorney who will automatically be in a conflict of interest. This is guaranteed to create distrust and often creates acrimony and disputes. These disputes can destroy families!

For instance, an attorney who is also a beneficiary of your estate can have a conflict between spending money on your care while you are alive and maximizing their inheritance. Similarly, the attorney might want to take funds from the estate for their own purposes, to avoid sharing them with other beneficiaries. This not as uncommon as it should be for for adult children, and you should give this conflict of interest, and the potential problems it can create, serious thought before granting the PoA.

Choose successor attorneys

A power of attorney can last a long time after grant, whether the attorney is acting on it or not. Someone who was a perfectly suitable attorney at one time, may no longer be able or willing to act many years later. You should name at least one alternate attorney.

Consider using a professional

Unless you have a relative or friend who happens to enjoy filing legal forms and doing taxes and accounting, you should consider appointing an independent professional who is not a beneficiary of the estate to be your attorney. Often, this will get the job done 'better, faster' and without the risk of poisoning family relationships.

THE POWERS OF THE ATTORNEY

What the attorney can do

Unless otherwise restricted in the power of attorney document, an attorney has the authority "*to do everything that the grantor can do, except make a will*".

This is enormous power. It should be granted and handled with great care.

The actions of an attorney can have a massive impact on the income and assets of the grantor, the lifestyle of the grantor, and on the value of the grantor's estate (and thus what remains for the beneficiaries of the grantor).

Limits: what the attorney cannot do

The law in Ontario is that an attorney for property cannot 'make or change any testamentary dispositions of the grantor'.

Thus, as the law currently stands, the attorney acting for an incapable grantor cannot:

- make or amend the grantor's will;
- amend the grantor's beneficiary designations on a life insurance policy or RRSP;

It is not clear whether a designation on a TFSA is a ‘testamentary disposition’. It likely is.

If the grantor is competent, different rules *may* apply (see below, Duties of the Attorney).

Bank accounts held in joint tenancy

Joint tenancy for bank accounts is a challenging ownership structure that can lead to unfairness and disputes (we do not recommend it, especially as a way to avoid probate or manage your finances: a properly drafted PoA is better).

While the grantor is alive, the grantor has the power to handle all funds held in bank accounts in joint tenancy unilaterally without consultation with the other joint tenant. Thus, arguably so too does the attorney for property, at least while the grantor is capable.

On occasion the attorney may, even if the grantor has lost capacity, remove funds from a bank account held in joint tenancy transfer them to third parties or to a separate account in the name of the grantor only, but only if the attorney can clearly establish that this was in the best interests of the grantor (not, for instance, the attorney or the beneficiaries of the grantor’s estate).

However, it is very unclear what an attorney can do with or to bank accounts held in joint tenancy between the grantor and someone who is not the grantor or the attorney. It is especially unclear whether the attorney can revoke the joint designation, close the account, or remove most of the funds.

<u>We strongly recommend that an attorney should receive good legal advice before taking any drastic action with a joint account.</u>

Real estate held in joint tenancy

Most of the time it is not possible for a joint owner of real estate to act unilaterally to sell real property without the other joint owner, and thus it is unlikely than an attorney can sell real property jointly owned by the grantor without the consent of the other joint owner.

On the other hand, a joint tenant does have the right to demand, unilaterally, that title to a property be changed from ‘joint tenancy’ to ‘tenants in common’. Unlike with joint tenants, one tenant in common does not inherit the interest of the other tenant in common. Such a change is likely a testamentary disposition, and therefore cannot be effected by a power of attorney acting for an incapable grantor.

THE DUTIES OF THE ATTORNEY

The test applied to the conduct of the attorney depends on whether the grantor is capable or incapable. As long as the grantor is capable, the attorney is an "agent" of the grantor and can act accordingly; if the grantor is incapable, the attorney is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.

An attorney acting under a continuing PoA when the grantor is incapable must focus on the best interests of the grantor. The attorney is not entitled to make decisions based on what is good for the attorney, or to consider or act for the beneficiaries of the grantor when the grantor dies. All of the attorney's actions should be in the best interests of the grantor of the PoA.

Standard of care

The standard expected of any attorney (for instance, with respect to investments) depends on whether the attorney is being compensated or not.

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

Mandatory expenditures

The attorney shall make the following expenditures from the grantor's property:

1. The expenditures that are reasonably necessary for the grantor's support, education and care.
2. The expenditures that are reasonably necessary for the support, education and care of the grantor's dependants.
3. The expenditures that are necessary to satisfy the grantor's other legal obligations.

GUIDING PRINCIPLES

In determining the amounts of expenditures, the attorney shall consider

- The value of the property, the accustomed standard of living of the incapable person and his or her dependants, and the nature of other legal obligations shall be taken into account.
- Expenditures under paragraph 2 may be made only if the property is and will remain sufficient to provide for expenditures under paragraph 1.
- Expenditures under paragraph 3 may be made only if the property is and will remain sufficient to provide for expenditures under paragraphs 1 and 2.

Optional expenditures

The attorney may make the following expenditures from the incapable person's property:

1. Gifts or loans to the person's friends and relatives.
2. Charitable gifts.

GUIDING PRINCIPLES

The following rules apply to optional expenditures:

1. They may be made only if the property is and will remain sufficient to satisfy the requirements for mandatory expenditures.
2. Gifts or loans to the incapable person's friends or relatives may be made only if there is reason to believe, based on intentions the person expressed before becoming incapable, that he or she would make them if capable.
3. Charitable gifts may be made only if,
    i. the incapable person authorized the making of charitable gifts in a power of attorney executed before becoming incapable, or
    ii. there is evidence that the person made similar expenditures when capable.
4. If a power of attorney executed by the incapable person before becoming incapable contained instructions with respect to the making of gifts or loans to friends or relatives or the making of charitable gifts, the instructions shall be followed, subject to paragraphs 1, 5 and 6.
5. A gift or loan to a friend or relative or a charitable gift shall not be made if the incapable person expresses a wish to the contrary.
6. The total amount or value of charitable gifts shall not exceed the lesser of,
    i. 20 per cent of the income of the property in the year in which the gifts are made, and
    ii. the maximum amount or value of charitable gifts provided for in a power of attorney executed by the incapable person before becoming incapable

Personal comfort and well-being

The attorney should consider the grantor's personal comfort or well-being and manage the grantor's property in a manner consistent with decisions concerning the person's personal care made by the grantor's attorney for personal care.

Explanation, Participation and Consultation

The attorney should explain to the grantor the attorney's powers and duties. The attorney should encourage the grantor to participate, to the best of the grantor's, in the attorney's decisions.

The attorney should foster regular personal contact between the grantor personally and supportive family members and friends of the grantor, and the attorney should consult from time to time with,

(a) supportive family members and friends of the grantor who are in regular personal contact with the grantor; and

(b) the persons from whom the grantor receives personal care.

The grantor's Will

The attorney is obliged to review and consider the grantor's will, and to this end the attorney is entitled to receive a copy of the grantor's will.

The attorney should not dispose of any property that the attorney knows is subject to a specific testamentary gift in the grantor's will.

The right to compensation

Unless the PoA excludes compensation, an attorney for property is generally entitled to compensation at the following rates:

- 3% of income and capital receipts
- 3% of income and capital disbursements
- 0.6% per year of assets under management.

Note, however, that an attorney who receives compensation is held to a higher standard of care than one who does not.

Keeping Accounts & Records

An attorney must keep detailed accounts and records of all transactions involving the property of the grantor. This includes detailed records of all assets, all income, all expenses and dispositions of assets. The attorney must maintain these records until relieved of the obligation – usually by Court order, or, by giving the records to the trustee of the estate of the grantor after the grantor's death.

Many attorneys fail to keep proper records. This exposes them to liability and creates unnecessary ill-will. An attorney should avoid cash transactions, always get and retain receipts, and ensure that there is a well-documented and properly organized paper trail for the entire period that they were the attorney.

PASSING ACCOUNTS

Passing accounts is the process of formally submitting accounts to the Court for approval. This is the most common method of airing and resolving disputes about the actions of an attorney. Similarly, attorneys who think that they have been unfairly accused of improper conduct use a formal passing of accounts to secure Court approval of their accounts.

An attorney may voluntarily choose to pass their accounts, or, may be required to pass their accounts. For instance, the trustee of the estate of a deceased grantor may require an attorney who acted under a PoA prior to the death to pass their accounts.

If, the attorney acting under a PoA prior to death is the same person as the executor under the will, the beneficiaries of the estate may, on leave of the Court, require the attorney (now executor) to pass their accounts for period when the attorney acted under the PoA. This is separate and distinct from the obligation of the executor to prepare, and potentially pass, the executor's accounts.

A passing of accounts is a formal Court proceeding governed by the Rules of Civil Procedure. Mandatory rules govern every aspect of these proceedings, including form and content of the accounts, the process for initiating a passing of accounts, the parties who must be served and how, the rights of the various parties to submit evidence and argument and contest the attorney's accounts, and the right of various participants to reimbursement of some or all of their legal fees.

RETENTION, REVOCATION, DESTRUCTION

Retention

Generally, it is only possible to act on an original PoA (or notarized true copy of the original), and thus it is very important to keep the original(s) safe and secure where it can be easily located when needed, but not accessed inappropriately before.

There are three options:

- The grantor keeps it.
- The grantor gives it to the attorney. Beware that unless the PoA includes a condition precedent, then the attorney can act on it at any time.
- Leave it with your lawyer or other trusted intermediary, who is to release it to the attorney but only if certain conditions are met. The key is documenting properly the conditions under which the intermediary should release it (eg. “if I am incapable of managing my affairs”) and ensuring that there are suitable means to determine if those conditions have been met.

Revocation

You should revoke all prior PoAs when you make a new one. Revocation should be done expressly in the text of the new PoA. Only a person who is capable of granting a PoA is capable of revoking one. Accordingly, someone who has lost the capacity to grant a PoA cannot fire or terminate their attorney.

Destruction

A PoA that is destroyed by the grantor is revoked. You can revoke a PoA by tearing it, burning it, or the like. Generally, if you make a new PoA you may wish to destroy

previous ones. However, if there is any concern about the validity of a new PoA (for instance, if there is concern about the capacity of the grantor), then retaining a prior valid PoA can be helpful.

Loss

Normally, only an original PoA can be enforced. If the original has been lost, the presumption is that the testator destroyed it and thereby revoked it. This presumption can be overcome, but with considerable difficulty. It is very difficult to deal with a lost or misplaced PoA, and thus it is very important to keep original PoA in a safe location while also ensuring that they can be located when required.

JOINT POWERS OF ATTORNEY

It is important to distinguish between:

a) PoAs which name two or more attorneys 'in succession';
b) PoAs which name two or more individuals as 'joint' attorneys (together); and
c) PoAs which name two or more individuals as attorneys who may act "severally" (separately).

Attorneys in succession come 'one after the other'. If, but only if, the first attorney is unable or unwilling to act, can the succeeding one act. Once a successor attorney acts because the prior would or could not, then the prior attorney permanently loses capacity to act and may not act at a later time.

Attorneys who are joint must act together. They are required to consult with each other and make decisions with each other. An attorney who is joint with another does not have the right to act unilaterally.

Attorneys who are several may act independently. An attorney who is 'several' with another is not required to consult with the other and may act unilaterally.

Thus, appointments that are "joint and several" essentially devolve to "several", and the "joint" aspect is over-ridden. We do not recommend 'joint and several' grants.

GUARDIANSHIP: WHEN THERE IS NO POA

In Ontario, if you are incapable of managing your property and there is no PoA, then a Court-appointed guardian is required. These applications are moderately complex, and impose significant cost and delay. Potential guardians should hire an experienced lawyer to assist them make a guardianship application.