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APPROACHES TO DRAFTING POWERS OF ATTORNEY - IS BOILERPLATE ENOUGH?

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INDEX

Approaches to Drafting Powers of Attorney - is Boilerplate Enough?

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1. Introduction

The title to this paper is meant to be provocative. Its underlying message is the assumption that powers of attorney are too often treated and prepared as simple, routine documents, often using, or at least primarily based on, standardized forms made available by legal publishers.

It is this writers' view that this is too often the case in Ontario legal practice. With now over 15 years of experience with the *Substitute Decisions Act*, *1992*, (the "SDA") the bar should be raised, and the planning process for powers of attorney needs to become more focused and sophisticated. Standardized forms which do not deal with complicated issues such as appointment of alternate and successor attorneys, methods of decision-making, formulas for compensation, liability and individual wishes and directions on specific issues are not adequate to meet our client's needs. Fast forwarding ten, twenty, thirty and more years, the issue is: how should we be designing and drafting powers of attorney to meet the needs of the demographic shift that will see dramatically larger percentages of the

population living longer, and for extended periods of time in various stages of incapacity? What the profession has done for approximately the last twenty or thirty years will simply not meet those needs, much less best serve them.

First, a bit of a historical retrospective. Using powers of attorney as incapacity planning tools is relatively new in Ontario estate planning. While we have several hundreds of years of jurisprudence and practice in the common law of using wills and trusts, in Ontario, the use of a power of attorney for incapacity planning came about just over thirty years ago with the *Powers of Attorney Act*, *1979* which allowed a power of attorney to survive incapacity. For newer practitioners, this may come as somewhat of a revelation, and the immediate first question on one's lips may be, "how then did the profession and society deal with incapacity if not by a simple power of attorney?" The response is simple - there was no way except bringing proceedings under the former *Mental Incompetency Act* to have a committee appointed, who would then carry out his or her duties under court supervision.

Prior to April 3, 1995 when the SDA came into effect, it was not that common even after the advent of the *Powers of Attorney Act*, *1979* to prepare powers of attorney as part of the estate planning process, which was focused primarily on will planning. All that changed with the SDA, which created a comprehensive legislative regime for substitute decision-making. A lot of media attention was generated concerning powers of attorney, and the potential of the Public

Guardian and Trustee's involvement in one's affairs if one did not have one, which heightened public awareness and the appetite and demand for executing a power of attorney. And so the estate planning process changed to include incapacity planning. Now most clients execute a will, and a continuing power of attorney for property and a power of attorney for personal care as his or her basic estate plan.

The preparation and drafting of powers of attorney was initially largely influenced by legal stationer's forms. The profession grappled with these new tools, and what provisions should be in them. In the beginning, when the SDA was new, a primary concern of practitioners was to ensure banks and financial institutions would recognize and understand them. There was a sense of comfort in using a legal stationer's form, and that in "filling in the blanks", a bank or financial institution would have familiarity with the form, and recognize its legitimacy, and so it was thought preferable to stick to the "tried and true".

But gradually, these standardized forms were considered by many practitioners to not allow enough flexibility and to be too simple, and so practitioners, particularly those who restrict their practice to estate planning, have developed their own unique precedents for powers of attorney. Yet it is still commonplace to come across the "standardized" forms. A bifurcation in legal practice has developed on these issues. And now time to move away from those overly

simplistic forms, and as well, precedents which often only make minor substantive changes to them.

2. Limitations on the Scope and Use of Powers of Attorney

It is important to recognize that, at least in terms of property management, there are alternatives to using a power of attorney, primarily using a trust, including for those persons age 65 or older, an alter ego trust and a joint partner trust. At this point in professional practice, use of a trust is a far less popular choice than a power of attorney as an incapacity planning tool. The primary reason is cost. Establishing and funding a trust by transfer of most of one's assets to it is an expensive process relative to preparing a power of attorney. However, it is submitted that trusts will become increasingly popular because they offer many advantages over a power of attorney which make them superior, including those set out below.

(i) A Trust Agreement is More Comprehensive

Using a trust agreement, one may choose individuals to act in the event of one's incapacity, who are subject to comprehensive terms providing for the trustees' specific duties and powers, tailored to meet one's individual circumstances. In contrast, a power of attorney is typically simpler and does not contain detailed

provisions providing a framework for the management of property, including for example, business assets or real estate.

(ii) Trusts Continue After Death: More Continuity

While a trust continues on after death, a power of attorney does not. Uninterrupted management by the trustees can continue after death or incapacity without the need to wait until estate trustees have probated a will to establish their authority to third parties.

(iii) Better Protection in the Event of Incapacity

A trust arguably offers superior protection to a power of attorney in the event of one's financial incapacity. The property held under the trust can be managed by one's trustees, and the ability to continue to independently deal with assets, once incapacity has been determined, can be terminated in accordance with the procedure stipulated under the trust agreement, usually by medical opinions.

In a situation where there is a potential for undue influence and "overreaching" by friends and relatives, a trust arrangement is more protective than a power of attorney. Because one will not have independent control of one's assets, and the involvement of one's trustees will be necessary, a wall of protection is created. In contrast, under a power of attorney, the donor can act unilaterally. How "protective" the trust will be depends on how its terms have been structured, including whether one has reserved a power to remove the trustees or to revoke the trust arrangement.

(iv) Greater Privacy and Control

A trust arrangement is highly private. Its use results in less involvement of the courts or government regulatory bodies such as the Public Guardian and Trustee, than if a power of attorney is used. A power of attorney will terminate if a guardian is appointed by the court. As a result, it cannot be relied on to secure one's choice of who should manage one's affairs in the event of incapacity, since this issue may always become subject to court determination. If one's assets are settled on trust, they will not be subject to such intervention – instead, only assets one directly retains will be. Accordingly, a trust can be more effective in ensuring continued private and confidential control and management of one's assets and affairs, without the intervention of outside regulatory government bodies or the courts.

(v) Comprehensive Management of Assets in Multiple Jurisdictions

If one dies owning assets located in several jurisdictions, in particular real estate, complex estate administration issues often rise. If one becomes incapable and owns assets in several jurisdictions, it is even more problematic.

Failing the existence of powers of attorney prepared in each jurisdiction in local form which survive incapacity, the prospect would then arise of having to commence court proceedings in each jurisdiction for a guardian, committee or equivalent legal representative to be appointed, an extremely expensive and time-consuming process. In addition, local rules may prescribe that only a resident of the jurisdiction may be appointed by the court.

The use of a trust will circumvent the need for multiple powers of attorney, as well as the problems encountered if local law does not allow for continuing or durable powers of attorney which survive a donor's incapacity.

With regard to the limitations on use of a power of attorney, it is also important to consider that a power of attorney has a different legal nature than a trust. The primary legal basis for a continuing power of attorney lies in agency, not in trust law. The law of agency is concerned with the authority provided by a principal to his or her agent. Powers of attorney authorize actions, but do not typically provide instructions obligating an attorney to carry out certain acts, unlike a trust agreement which can create a mandatory regime for property management, and legal obligations to carry out specific acts once the trustee accepts the trusts under the trust agreement.

The SDA, in subsection 37.(1) and (2), however, does impose limited obligations requiring the attorney to make required expenditures, following certain guiding principles as follows:

> "**Required expenditures**
>
> **37.** (1) A guardian of property shall make the following expenditures from the incapable person's property:
>
> 1. The expenditures that are reasonably necessary for the person's support, education and care.

2. The expenditures that are reasonably necessary for the support, education and care of the person's dependants.

3. The expenditures that are necessary to satisfy the person's other legal obligations.

Guiding principles

(2) The following rules apply to expenditures under subsection (1):

1. 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.

2. Expenditures under paragraph 2 may be made only if the property is and will remain sufficient to provide for expenditures under paragraph 1.

3. 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."

In this respect, the SDA statutorily imposes an obligation to act with regard to required expenditures. It is noted that in defining the scope of a continuing power of attorney for property, subsection 7.(2) uses permissive language in "may authorize":

"(2) The continuing power of attorney may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will."

The question arises, can one impose directions on an attorney to carry out specific acts and if so, how? It would seem that where it is desired to impose mandatory obligations to deal with property in a certain way, a trust would be the preferred vehicle. Where a power of attorney is to be used, consideration could be given to preparing an agreement to be signed by the attorney and the grantor setting out the desired actions to be taken. These might include such matters as: directing sale of a business, directing the restructuring of an investment portfolio, directing the attorney to make payments so the grantor can continue to live in their home as long as reasonably possible, even at significant cost, directing certain "luxury" level expenditures. Alternatively, the grantor could consider preparing a letter of wishes with regard to various property management issues, which would be non-binding, but could set out guiding principles.

The statutory regime for powers of attorney for personal care under the SDA is quite different. It creates a mechanism by which the wishes of the grantor are legally binding on the attorney who is obligated to carry them out so long as reasonably possible. In this regard, the SDA, firstly, does not just authorize, it obligates the attorney for personal care to carry out various acts, including subsection 66.(2.1) which directs the attorney to make decisions on the incapable person's behalf to which the *Health Care Consent Act*, *1996* applies in accordance with the SDA, and to make decisions to which the *Health Care Consent Act*, *1996* does not apply in accordance with the principles stated under

subsection 66.(3). Section 66 sets out a serious of other duties the attorney has.

For example, subsection 66.(3) states as follows:

> "**Other decisions**
>
> (3) The guardian shall make decisions on the incapable person's behalf to which the *Health Care Consent Act, 1996* does not apply in accordance with the following principles:
>
> 1. If the guardian knows of a wish or instruction applicable to the circumstances that the incapable person expressed while capable, the guardian shall make the decision in accordance with the wish or instruction.
>
> 2. The guardian shall use reasonable diligence in ascertaining whether there are such wishes or instructions.
>
> 3. A later wish or instruction expressed while capable prevails over an earlier wish or instruction.
>
> 4. If the guardian does not know of a wish or instruction applicable to the circumstances that the incapable person expressed while capable, or if it is impossible to make the decision in accordance with the wish or instruction, the guardian shall make the decision in the incapable person's best interests."

3. Decision-making: Majority and Special Provisions

In choosing attorneys, the appointments made will often (but not always) parallel the appointments made of executors and trustees.

Particularly where the estate is large or complex, the grantor of a continuing power of attorney for property may wish to appoint his or her spouse along with co-attorneys for the same reasons that multiple executors and trustees may have been appointed: protection of the capital by having the "balance and check" of more than one person with signing authority and the skill set of attorneys who have business acumen, as well as ensuring where one's spouse is appointed, but is of advanced age, that he or she acts with others to take account of diminished capacity and health.

Similar considerations should apply in choosing one's attorneys, taking into account that the SDA allows for flexible decision making. In this regard, subsection 7.(2) provides:

> "If the continuing power of attorney names two or more persons as attorneys, the attorneys shall act jointly, unless the power of attorney provides otherwise."

A similar provision applies under subsection 46.1(4) to a power of attorney for personal care. The issues involving powers of attorney for personal care are different and are based more on what the appropriate hierarchy among ones close family and/or friends should be, but taking into account similar considerations where a spouse is aged, or the converse where children may be too young to act at all, or because of their youth, should act with more senior family members, such as siblings, where alternate appointments to one's spouse

are being made. Where there are "blended" families, and second or more marriages, each situation might be quite different with regard to choice of decision-makers.

To facilitate decision-making, a majority decision clause should be considered to prevent deadlock. Although a majority may act and be binding, since it is a joint appointment, all decisions still need to be made in consultation with all attorneys. As well, one or more attorneys could be specified to have to form part of the majority, effectively giving him or her a veto.

Consider the following clause:

> **Decision of Majority** - Whenever there are more than two (2) of my attorneys acting the decision of a majority of my attorneys, of which my spouse, ●, shall be one during any period my spouse is acting as one of my attorneys, shall prevail. Any one or more of my attorneys who acts in good faith and does not form part of any majority decision shall not be personally liable by reason of the acts or omissions which result from such majority decision. Every document executed by a majority of my attorneys, of which my spouse, ●, shall be one during any period my spouse is acting as one of my attorneys, shall be as valid, effectual and binding as if executed by all of my attorneys and all parties may rely on such document for all purposes.

4. Alternate and Successor Appointments

It is critical in drafting powers of attorney to consider alternate appointments in the event the first named attorney(s) are not able to act, for whatever reason.

In respect of continuing powers of attorney for property, failure to provide adequately for alternate appointments can have severe repercussions. Should an incapable person not have an attorney who can continue to act on his or her behalf, the Public Guardian and Trustee might become the incapable person's statutory guardian of property or guardianship proceedings might have to be taken to have a guardian appointed by the court with the attendant expense, delay and long-term court supervision that the grantor tried to ensure would be avoided by appointing attorney(s).

In respect of powers of attorney for personal care, the *Health Care Consent Act, 1996* sets out a hierarchy of family members who can provide healthcare consent, but this is limited and does not apply to other personal care issues, resulting in the need to have an attorney for personal care appointed. It should also be borne in mind that the family members entitled to give health care consent may be objectionable to the client, particularly where there has been a dispute. That family member entitled to make a decision of life or death, for example, an estranged sibling, may be the last person in the world the client would wish to have making such a decision!

As well, consider that the need to bring guardianship proceedings could be the tinderbox to expensive and unneeded litigation if there is family dissention.

There should be no need to resort to having a guardian if the power of attorney provides for the appointment of alternate attorneys and a mechanism to ensure an attorney is always in office.

One of the issues in providing alternate appointments is ensuring clarity when the alternate appointment is triggered, and providing evidence and comfort to third parties, such as financial institutions, that the appointment of the alternate attorney is valid, and that the financial institution is taking instructions from the correct attorney.

In the context of wills and trusts, this issue historically has not been a problem. Wills and trust agreements commonly appoint alternates without a means for demonstrating to third parties that the alternate appointment is in effect. One may surmise that this is the case because the majority of alternate appointments are the result of death or resignation which can be established by a death certificate or form of resignation. As well, there is the ability in Ontario to secure a "Short Court Certificate" from the court after submitting appropriate affidavit evidence to confirm who the trustees are or who is entitled to be estate trustee.

This mechanism, unfortunately, does not apply to attorneys under a power of attorney.

Consider the following language allowing the alternate-named attorneys to make a determination with regard to the incapacity of an attorney to act and the evidence that may be relied on by third parties that an attorney is deceased, or is unwilling or unable to act or to continue to act:

> (i) Any determination of whether any of my attorneys for property is unable to act or to continue to act as my attorney for property because such attorney is incapable of managing property shall be made by my continuing attorney(s) for property, or if there is no continuing attorney(s) for property, by my alternate attorney(s) for property, appointed under paragraph ● above. The determination that any attorney is incapable of managing property, whether temporarily or permanently, shall be based on the written opinion of such attorney's family physician or attending physician.
>
> (ii) A letter from my continuing attorney(s) for property, or if there is no continuing attorney(s) for property, by my alternate attorney(s) for property, appointed under paragraph ● above, stating that such attorney is deceased, is unwilling or unable to act or to continue to act as my attorney for property shall be conclusive evidence of that fact. Third parties may rely on such letter without independent verification and shall not be held liable or accountable for such reliance.

This type of language is increasingly common in Ontario powers of attorney.

The practice of preparing multiple "stand-alone" continuing powers of attorney for property appointing different attorneys held by the clients' lawyer with directions to release it if the attorney under the primary power of attorney dies or becomes incapable is another approach adopted by some practitioners, but problematic and increasingly not as common. It puts the lawyer in a difficult position as arbiter of these issues, with attendant responsibility and liability, and for no additional compensation.

A client's will may often provide that there be a minimum number of executors and trustees, and provide authority for the remaining executors and trustees to appoint substitutes to ensure there is a minimum number, often two or three.

It will often be desirable to parallel this process under a continuing power of attorney for property to ensure there are always attorneys who can continue to act, and that there is the "balance and check" of a minimum number of attorneys, particularly where the client's spouse is not acting.

The issue arises of whether a grantor under a continuing power of attorney can expressly cloak his or her named attorneys with the power to name successor attorneys to ensure a minimum number. It would seem there is no reason why not.

Section 12.(1)(a) contemplates the ability to provide for the substitution of other persons in broad terms and states as follows with regard to termination of a continuing power of attorney:

> "**Termination**
>
> **12.** (1) A continuing power of attorney is terminated,
>
> (a) when the attorney dies, becomes incapable of managing property or resigns, unless,
>
> (i) another attorney is authorized to act under subsection 7(5), or
>
> (ii) the power of attorney provides for the substitution of another person and that person is able and willing to act;"

There would appear to be no legal reason why a grantor cannot provide for a mechanism for appointment of substitutes. This is consistent with the approach often used in wills and trusts, which for centuries have provided for the ability of executors and trustees to name substitutes to ensure continuity, usually by a deed of appointment in writing. The following type of clause might be considered:

> **Minimum Number of Attorneys** - I declare there shall always be at least two (2) persons acting as my attorneys for property. My attorneys shall have the authority to appoint by instrument in writing one or more persons or a trust company to act as my attorneys in order that there shall be at least two (2) persons acting as my attorneys for property.

5. Dealing with Attorney Liability

Sections 33.(1) and 33.(2) of the SDA set out that a guardian of property is liable for damages resulting from a breach of the guardian's duty. The same provision is deemed to apply to attorneys for property. As well, the court has authority to relieve a guardian from all or part of the liability. The legislation thus codifies the common law position for breach of fiduciary duty, and has similar relieving provisions as under s.35 of the *Trustee Act* (Ontario) in respect of trustee liability.

It is common practice to include a provision dealing with liability of trustees in wills and trust agreements excusing the executor or trustee from certain acts, including where there is simple, not gross negligence.

Consideration should be given to providing similar language in a continuing power of attorney for property for the protection of the attorney. A clause such as the following might be considered:

> **No Liability for Losses** - My attorneys shall not be liable for any loss that may happen to my property or be suffered by me or any other person resulting from the exercise by my attorneys of any discretion given them in this document or by their acting or failure to act pursuant to the powers herein contained unless such exercise or act is done, omitted or caused by the wilful default or gross neglect of my attorneys.

For whatever reason, it does not appear common to include such provision in a power of attorney, but it is submitted there is no reason they should not be included, for the same reason they are typically included in wills and trust agreements. A consistent approach seems preferable and appropriate.

6. Compensation: The Need for "Tailored" Approaches

In preparing powers of attorney, as in the case of wills and trust agreements, an important issue to discuss with the donor is compensation of the attorney. It is submitted that it is "not good enough" to not broach the subject and simply let the legislation govern. In the case of continuing powers of attorney for property, the fee scale prescribed under Ontario Regulation 26/95 may not be appropriate. In the case of powers of attorney for personal care, there is no regulation yet prescribing the level of compensation, although the SDA in Section 90(1)(c.1) contemplates one, and emerging case law is all we have to provide some guidance, which is still vague and uncertain.

There are various options to explore with each client, similar to the discussion to be had with regard to executor and trustee compensation. Some of the issues to be discussed are: whether the client wishes to expressly provide for compensation, or simply let the fee schedule under the Regulation operate? Is the fee schedule under the Regulation appropriate? In larger estates where the

donor has a high net worth, it may be considered too generous. The donor may wish to include different percentages considered more reasonable. The donor should also consider whether both family and non-family members should be entitled to compensation, and if only the latter, the power of attorney should set this out. Where professionals, in particular, are acting as attorneys, a different basis for compensation, such as normal hourly billing rates based on time spent may be considered more appropriate. An hourly billing rate, cost of living adjusted, may be considered appropriate for others as well, subject to a maximum amount or some other reference point, such as what the fee schedule under the Regulation would result in. A few sample clauses are set out below:

> **Compensation** - My attorneys shall be entitled to receive compensation from my property monthly, quarterly or annually, calculated at a rate of ● Dollars ($●.00) (CDN) per hour based on the time spent in dealing with my property, such hourly rate to be adjusted annually in each year after the date of execution of this Continuing Power of Attorney for Property in accordance with the Consumer Price Index ("CPI") published from time to time by Statistics Canada for "all items" for the City of Toronto (not seasonally adjusted) such that if the CPI for 2011 is greater than the CPI for 2010, such hourly rate shall be increased in direct proportion to the percentage increase of the CPI of the year of adjustment to the CPI of the previous year and so on for each year after the date of execution of this Continuing Power of Attorney for Property until the date of my death.

* * *

> **Compensation** - It is not my expectation that any of my attorneys who are relatives or family members of mine, **[or my friend, ●]**, will take compensation for acting as my attorney, but I leave this decision to their good judgment, taking into account any circumstances which may exist which justify that they take compensation.
>
> * * *
>
> **Compensation** - My attorneys who are relatives or family members of mine including by marriage shall not be entitled to receive compensation for acting as my attorneys.
>
> Subject to Paragraph ●(a) above, my attorneys who are authorized to take compensation shall be entitled to take annual compensation from my property monthly, quarterly or annually, in accordance with the fee scale prescribed pursuant to the *Substitute Decisions Act*, 1992, (Ontario) but limited to their *pro rata* share based on the number of attorneys who are acting.

The issue of compensation for attorneys for personal care is problematic. Does the donor wish his or her attorney to be compensated? How should compensation for personal care be determined? What is an appropriate rate? These are the issues the profession and the courts are grappling with.

In *Cheney v. Byrne (Litigation Guardian of)*, 2004; 9 E.T.R. (3d) 236. (Ont S.C.J.), the court allowed two lawyers who acted as attorneys for personal care compensation based on an hourly rate, using their normal billing rate, but discounted. One approach is to provide for a level of compensation as agreed with the attorney for property. This is perhaps the most flexible approach. A

Letter of Wishes might also be prepared providing guidelines and the donor's thoughts and expectations with regard to compensation. With an increasingly aging population, the need to develop approaches for dealing with compensation for personal care will become increasingly important, as society in turn gives more regard and recognition to the value of these services, which arguably have traditionally been undervalued, or not been given any financial recognition.

7. Adding Substance: Using Letter Agreements and Letters of Wishes

In order to provide a more comprehensive arrangement for the management of the attorney's property, a letter agreement or letter of wishes can be used. The letter agreement, to be binding, would require that the attorney execute the agreement as well as the donor. The Letter of Wishes is non-binding and precatory, setting out thoughts, wishes, and guidelines that the donor wishes be carried out.

It is to be noted that part of the process for appointment of a guardian for property is a detailed management plan for the donor's property, and for the appointment of a guardian of the person includes a guardianship plan for personal care.

Yet in preparing continuing powers of attorney for property, it is not typical to provide for any type of detailed plan or directions. The donor can have much

more direction in the process by setting out key issues in a letter agreement, taking account of the types of issues what would be included in a management plan, which could deal with such matters as:

- investment policy
- disposition of key assets such as a business, principal residence, recreational property, art collection
- level of expenditures
- aging "in place" versus in an institutional setting and attendant costs
- tax planning and reorganization of assets
- maintenance of life insurance and payment of premiums

Trust companies often use letter agreements in conjunction with continuing powers of attorney for property, dealing with a number of issues as well as their compensation.

8. Conclusion

Powers of Attorney can better serve our client's incapacity planning needs if we "raise the bar", and deal with a host of issues which are not as commonplace as they should be in their preparation.

In response to the title of this paper, no, boilerplate is not "good enough", just as the mythical "simple will" is not good enough to meet most client's needs for comprehensive, well-thought out and individualized planning. "Under planning" under-serves our clients, and is often the reason for disputes and expensive court proceedings which could have been avoided. The onus is on estate planning lawyers to act preventatively, and to continually update their planning documents to ensure they meet their client's best interests.