THE LAW SOCIETY OF UPPER CANADA

16th ANNUAL ESTATES AND TRUSTS SUMMIT

Conflict of Laws Issues in Drafting and Using Powers of Attorney for the Mobile Client

November 12, 2013

Margaret R. O'Sullivan

O'SULLIVAN
ESTATE LAWYERS

Ernst & Young Tower
Toronto-Dominion Centre
222 Bay Street, Suite 1410
PO Box 68
Toronto ON M5K 1E7

Tel: (416) 363-3336
Fax: (416) 363-9570
Website: www.osullivanlaw.com

Conflict of Laws Issues in Drafting and Using Powers of Attorney for the Mobile Client

Margaret R. O'Sullivan[1]

INTRODUCTION

There is a convergence of a number of factors that will cause we as estate planners to increasingly think much longer and harder about what we need to do to best plan for our clients' incapacity. For instance, greater consideration will need to be given to using powers of attorney that goes beyond a purely domestic approach.

Many of us are familiar with the use of multiple wills where our clients have assets in different jurisdictions. But what about multiple powers of attorney? How much thought and effort goes into ensuring our mobile clients have the right protective legal instruments in place?

Our clients are getting older, living much longer, travelling more, and are increasingly residing in other jurisdictions for protracted periods each year—in particular, in warmer climates south of the border.

---

[1] I would like to thank my colleague Jenny Hughes of O'Sullivan Estate Lawyers for her assistance in preparing the chart accompanying this paper and Marilyn Piccini Roy of Borden Ladner Gervais for reviewing the sections dealing with Quebec law.

Our affluent middle-aged clients are increasingly becoming less domestically focused. They are also acquiring second homes outside Ontario—whether a ski place in Quebec or B.C., or a golf villa in South Carolina, or maybe a country home in the south of France. And if they are not buying a place, they may be renting and spending significant time outside Ontario.

A strong Canadian dollar and depressed real estate prices in some of the most attractive places in the world to live are helping many to achieve what before seemed only a dream on their wish list, and perhaps spurred by reality shows featuring international real estate which have demystified the notion of owning foreign real estate, and brought this idea and exotic images into our living rooms and every day thinking.

These trends will likely only increase and, as our clients become more mobile, incapacity planning and how we advise our clients need to be more thoroughly considered to ensure our clients' best interests are served, wherever they may live.

1. Incapacity Planning Using Multiple Separate Situs Powers of Attorney

(a) Using Multiple Separate Situs Powers of Attorney

At this point in the development of the law, there is a lack of harmonization between many jurisdictions in respect of what effect a power of attorney prepared

in one jurisdiction will have in another jurisdiction, in particular powers of attorney for personal care and advance health directives.

Due to this lack of certainty, and also the time, expense, delays and lack of certainty or success that may result in seeking legal opinions and other processes to try to validate powers in another jurisdiction, a practical approach is to advise a client to put in place a local power of attorney for property and for personal care or equivalent instrument in each jurisdiction where he or she has assets, in particular real estate, or spends significant time.

For this purpose, it is important to carefully review a client's assets and understand his or her lifestyle and residence patterns. How much time is spent outside Ontario and in which jurisdictions? Does he or she have assets, in particular real estate, outside Ontario? How is title held? Solely in the client's name, jointly or otherwise? What is his or her age and general health? Based on these inquiries, an assessment can be made for which jurisdictions powers of attorney in local form should be prepared and where one may not be necessary, for example, where it is possible to change ownership or retitle assets, such as from sole to joint ownership, taking into account all relevant considerations, including tax consequences of any transfer and the loss of control over the assets.

(b) Drafting Issues in Using Multiple, Separate Situs Powers of Attorney

(i) Revocation

It is important in drafting and executing multiple powers of attorney that one does not by inadvertence revoke a pre-existing power of attorney which is meant to be preserved and that express provisions are included in each power of attorney to ensure they are preserved and not revoked. This can be accomplished by specifically referring in each power of attorney to other pre-existing ones and expressly confirming they are not to be revoked.

It should be noted that each jurisdiction can have different laws with regard to whether or not a power of attorney, unless otherwise directed, automatically revokes any prior ones or not.

In Ontario, subsections 12(1) and 53(1) of the *Substitute Decisions Act* (the SDA)[2] provides that a new power of attorney will revoke a previous one unless the grantor provides for there to be multiple powers of attorney.

(ii) Multiple Attorneys

It is important to try to make each separate situs power of attorney as parallel as possible to the principal power of attorney to ensure wherever possible the same

---

[2] *Substitute Decisions Act, 1992,* S.O. 1992, c. 30.

set of decision-makers, unless there are particular reasons why this is not advisable. This is not always possible since local legislation varies, and in some jurisdictions it is not possible to have co-appointments of multiple attorneys. In other jurisdictions, it may be possible to do so, but the appointments can only be joint, not several or by majority rule.

(iii) Termination

Local law may vary with regard to termination of a power of attorney. In Ontario, the death of the grantor automatically terminates a continuing power of attorney for property. This may not be the case for financial powers of attorney in other jurisdictions where death may not automatically terminate them. As well, in some jurisdictions, unlike in Ontario, marriage and divorce automatically terminate a power of attorney.

(iv) Compensation of Attorneys

It is important to understand what compensation is permitted, if at all, to attorneys and ensure this issue is properly addressed and integrated with the principal power of attorney, and that there is no possibility of double or over-compensation.

(v) Standard of Care

The standard of care in the local jurisdiction may differ from that under Ontario

law, or what is provided for under the Ontario power of attorney which may set a lower standard for family members who act for no compensation and a higher standard for those who act for compensation. To ensure consistency, to the extent it is permissible under local law, a similar standard should be adopted.

(vi) Execution Requirements

Each jurisdiction will have its own unique formalities for executing powers of attorney. Some are intricate and require a sworn statement by one of the witnesses before a notary as well as initials placed in several parts to indicate which provisions are to be adopted or not based on several options. It is important to liaise with local counsel when supervising execution to ensure all formalities are properly observed.

The length and intricacy of powers of attorney vary widely, including in the U.S., where some states have simple approaches, and others have lengthy, detailed and often confusing ones, and some are in the middle.

(vii) Advance Health Care Directives

It is common in many U.S. states to have very detailed, lengthy health care directives which allow the client to decide on many aspects of their health care. This approach is not typical in Ontario practice which tends to be more aspirational and generic than specific.

2. Using an Ontario Power of Attorney in Another Jurisdiction

In Canada, property rights as well as matters involving mentally incapable persons are under exclusive provincial jurisdiction, and each of the provinces has legislation to deal with such matters. Each of the Canadian provinces has legislation dealing with powers of attorney for property and for personal care. Some, but not all, provincial legislation has conflict of laws rules with regard to the formal validity of powers of attorney which are connected with another jurisdiction.

(a) Statutory Conflict of Laws Provisions

In Ontario, section 85 of the SDA provides that a continuing power of attorney or a power of attorney for personal care or their revocation is valid with regard to its formality if it complies with the internal law of any of the following:

(i) place of execution;

(ii) domicile of the grantor; or

(iii) habitual residence of the grantor.

The attached chart sets out which provinces and territories have conflict of laws provisions, and a summary of such provisions for those that do with regard to recognition of the formal validity of extra-provincial or extra-territorial powers of attorney, as well as for two key jurisdictions for Ontario-based estate planning—

Florida and Arizona.

Based on the summary contained in the chart, the following observations can be made with regard to whether under statute a power of attorney executed in Ontario will be recognized in these jurisdictions or not.

By way of summary, all of the Canadian provinces and territories with the exception of New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland have provisions for the recognition of a foreign power of attorney for property or equivalent. As well, all of the Canadian provinces with the exception of New Brunswick and Newfoundland have provisions for recognition of a power of attorney for personal care or equivalent. Both Florida and Arizona have such legislation as well for both types of power of attorney or equivalent, however recognition only applies to instruments executed in a U.S. jurisdiction.

In all of the Canadian provinces and territories, the term "*enduring* power of attorney" is used to describe a financial power of attorney that survives incapacity, with the exception of Ontario which is singular in using the term "*continuing* power of attorney" and Quebec which has three possible instruments: (i) general power of attorney; (ii) mandate in anticipation of incapacity; and (iii) a general power of attorney coupled with mandate in anticipation of incapacity.

Generally, in the Canadian provinces that have statutory recognition provisions, a foreign power of attorney will be recognized if it complies with the law of the

place where it is executed. Ontario adds as well compliance with the place where the grantor was domiciled or had his or her habitual residence, and Quebec adds compliance with the law of the place where the property is situated where the instrument is to be used, or the law of domicile of one of the parties. As well, in Quebec the foreign power of attorney may require homologation by the court upon the occurrence of incapacity before it is effective for use by the attorney. Homologation is a court process whereby the court, based on appropriate evidence, confirms the incapacity of the donor and the existence and validity of the instrument.

It is of interest that the *Hague Convention on the International Protection of Adults, 1999*, which is discussed in further detail below, allows for an express choice of law in which any of the law of the donor's nationality, former habitual residence or place where the property is located may be chosen, otherwise it is the law of the donor's habitual residence at the time of execution that governs validity and other formalities in respect of a power of attorney.

Based on the above analysis, in Canada, it would seem there are helpful express rules to allow recognition of powers of attorney for property or equivalent where they need to be used in Quebec and all jurisdictions west of it, and in all but two jurisdictions for powers of attorney for personal care or equivalent, which should be helpful where one seeks to use a power of attorney in those Canadian jurisdictions, without the need to rely on private conflict of laws rules and possible

court application to substantiate validity.

(b) *Hague Convention on the International Protection of Adults, 1999* (the "Convention XXXV")

Significant progress has been made in the European Union to harmonize conflict of laws rules applying to incapable adults through ratification of Convention XXXV. These rules deal with issues involving jurisdiction, applicable law, and recognition and enforcement of court orders involving guardianship or similar protective regimes in other jurisdictions. Convention XXXV also provides rules with regard to formalities and recognition of powers of attorney surviving incapacity which are a form of "powers of representation", the term Convention XXXV employs.

Czech Republic, Estonia, Finland, France, Germany, Scotland and Switzerland have each ratified Convention XXXV, and ratification is pending in Ireland. England and Wales have not yet ratified Convention XXXV, but has been under pressure to do so. It has, however, amended its mental capacity legislation to incorporate almost identical provisions to those in Convention XXXV. Canada is not a signatory to Convention XXXV, although it has been supported by the Canadian Bar Association. It should be noted that the Uniform Law Conference of Canada in 2001 prepared and adopted model legislation to implement Convention XXXV, called the Uniform International Protection of Adults (Hague Convention) Implementation Act.

Under Convention XXXV, an adult person can choose the law to be applied to a power of attorney, including which law governs amendment, termination, validity, and its scope, otherwise the law of one's habitual residence at the time of the grant of authority will apply.

The law of any of the following can be chosen:

(i) the law of the state where the person is a national;

(ii) the state of former habitual residence; or

(iii) the state where the adult person's property is located.

Accordingly, it is possible under Convention XXXV to have a power of attorney recognized in a jurisdiction which does not have such instruments.

The manner of exercising such power of representation is governed by the law of the state in which they are exercised. Accordingly, Convention XXXV gives primacy to the local law and any mandatory laws it may have, which could impact for example the use of advance health directives if they are not in accordance with the public policy of the jurisdiction where they are sought to be used. These provisions apply even if the law designated is the law of a non-contracting state to Convention XXXV.

It can be seen that Convention XXXV will be helpful in fostering cross-border advance incapacity planning and requires each contracting state to have

familiarity with the various planning regimes in existence in other jurisdictions. Convention XXXV also provides for a Certificate of Representation which confirms a person's authority to act and their powers.

Convention XXXV can have application to Ontario clients and those in other Canadian jurisdictions as well, even though Canada has not signed it. For example, an Ontario power of attorney for a client who is habitually resident in Ontario would be recognized automatically when an attorney seeks to use it on behalf of an incapable person in a contracting state. Query however the extent that a power of attorney for personal care would be effective to carry out a person's wishes in a contracting state based on differences in local law and public policy considerations.

As noted above, Canada has not signed Convention XXXV, and neither has the United States. The National Wills and Trusts Section of the Canadian Bar Association in a letter dated May 16, 2007 recommended to the Minister of Justice and Attorney General of Ontario that each Canadian province and territory convey their support for Convention XXXV to the federal government and urged Canada to consider being a signatory, but it appears little movement has occurred in the Canadian setting with respect to adoption and implementation of Convention XXXV.

(c) Private International Law Principles Where No Statutory Provisions

(i) Applicable Law

Where an Ontario power of attorney is to be used in a jurisdiction which has no conflict of laws provisions in its legislation with regard to the recognition of foreign powers of attorney, or if it does, such provisions do not have sufficient scope to permit recognition, which conflict of laws rules apply to determine these issues?

The law is somewhat mixed on these issues and often an analysis involving the law of agency is the one utilized on the basis that a power of attorney is a form of agency.

It is fair to say that notwithstanding the ubiquitous use of powers of attorney, including in the commercial context, there is scant literature or case law which deal with the issue of conflict of laws and powers of attorney, and what exists needs to be extracted through review of conflict of laws rules as they apply to agency.

In respect of the formal validity of a power of attorney, the issue arises of which choice of law rule applies under conflict of laws rules. The general rule is based on *locus regit actum*, that is, the law of the place of execution governs the validity of the form of a legal act.

With regard to the applicable law which governs the relationship between

principal and agent, Dicey, Morris and Collins[3] state that the applicable law is in general the proper law applicable to the contract or other relationship between them. The proper law of a power of attorney is often considered to be where the services are to be performed by the agent as established by *Chatenay* v. *Brazilian Submarine Telegraph Co.*[4]

A strictly contractual approach which looks to the relationship between principal and agent as a type of contract has been subject to significant legal criticism.

Seavey has stated that "agency is the power of one person to affect the legal relations of the others, which power results from the grant of authority by P and the assumption of the fiduciary obligation by A: it is not founded on contract, although there may be a contract governing the rights and obligations of P and A *inter se*."[5]

Goldfarb suggests it is important to not resolve choice of law issues simply by a mechanical application of the rules but to adopt an approach which is purposeful.

In respect of the choice of place of execution to govern formal validity, there does appear to be a clear purpose for such choice.

---

[3] *Dicey, Morris and Collins on The Conflict of Laws* (15th ed), Sweet & Maxwell Thomson Reuters at p. 2109.
[4] [1891] 1 Q.B. 79.
[5] As cited by Goldfarb, E. in "Agency and the Conflict of Laws: a critical reassessment, (1977) 35 U.T.L. Rev.

Using the law of the place of execution arguably facilitates international transactions, and it has been asserted that form should generally be a matter of indifference to the parties, as opposed to substance which is of import, "Therefore, as to form they should be permitted the speediest and easiest path, which is obviously by adherence to the place of execution."[6]

Notwithstanding private international rules for recognition looking to place of execution to substantiate formal validity, it seems that in many jurisdictions there is still a tendency to either by local law or in practice based on requirements of third parties including financial institutions, title companies and others to sometimes insist on conformity with local law, even as to execution requirements and other formalities, which serve to undermine the purpose of general private law rules allowing for recognition.

Where it is anticipated that an Ontario power of attorney may need to be used in another jurisdiction, a precaution is to have a Notary witness it and prepare a certificate to such effect which may facilitate recognition in other jurisdictions, in particular civil law jurisdictions. As well, it is preferable to add express powers in the power of attorney so there is more clarity on the attorney's powers.

In attempting to use an Ontario power of attorney in another jurisdiction, although

---

[6] Citing Battifol, Les Conflits de Lois 364 in "Powers of Attorney in International Practice", by Eder, P.H., (1950), 98 U.Pa.L. Rev., 840 at p. 36.

it may be formally valid, local law where it is to be used will dictate what substantive effect can be given to it, the rights and obligations of the donor and the attorney, including the scope of the attorney's authority, and any public policy considerations with regard to its use.

As an example, an Ontario power of attorney may authorize an attorney under Ontario law to have all the powers of the donor; except to make a will. However, when used in foreign jurisdictions, although it may be recognized as formally valid, local law could have requirements that circumscribe an attorney's powers to include other matters an attorney may not do, apart from making a will. As an example, there could be restrictions on the making of gifts which differ from Ontario law.

3. Case Study Involving Multiple Powers of Attorney

> An Ontario-born couple with adult children are based in Boston, Massachusetts where one spouse is a C.E.O. with a large, multinational corporation. They have financial assets in Ontario, primarily significant registered plans. They have a condominium on the Turquoise Coast in Antalya, Turkey and large bank deposits and investment accounts in New York City and London, U.K., as well as a country home in Provence, France. After sorting out their succession planning and its intricacies, it is now time to ensure proper planning for incapacity. You gather further information from your clients and find out that they do not spend any significant time in London or New York City, but that they primarily live each year in Turkey for part of July and August, frequently visit Ontario where they have relatives and intend to return to live eventually on retirement, and spend about two months each year in France.

In conjunction with your clients, you conclude that it would make sense to have a

financial power of attorney in each jurisdiction, and if possible, a power of attorney for personal care or its equivalent in each of Ontario, Turkey, France and Massachusetts. You consult with local counsel in each jurisdiction who prepare drafts for your review and you establish the following:

New York: In New York, a Power of Attorney governs financial matters as provided under New York General Obligations Law. A separate Health Care Proxy must be executed for health care decisions. Where more than one attorney is appointed, they must act together unless a statement in the power of attorney provides they may act separately. The Power of Attorney does not revoke prior powers of attorney unless it states otherwise. Express powers are set out in the Power of Attorney. In order to empower the attorney to make gifts over $500, the power of attorney must provide so and a Statutory Gifts Rider must be executed at the same time as the Power of Attorney. Attorneys are allowed reimbursement for reasonable expenses but compensation only if the Power of Attorney provides for same. The Power of Attorney must be signed before a Notary Public.

Massachusetts: The Massachusetts Power of Attorney is a simple general power of attorney and sets out the express powers of the attorney. It is executed before a Notary Public. A separate Living Will and Health Care Proxy is executed to deal with health care decisions. A separate authorization is executed to authorize release of medical information and records to the named

health care agents.

France: In France, a power of attorney which survives incapacity is called a "mandat de protection future", and is quite onerous. Under Article 481 of the French Civil Code, it will become effective once incapacity is established, at which point it must be registered for it to take effect. French counsel confirm that an Ontario power of attorney for property and for personal care will be recognized under Convention XXXV on the basis of the clients' Canadian nationality and Ontario domicile and for such purpose it should make such choice of law. As well, to ensure it will be recognized, it should be executed with a notary as witness so that it can be legalized and the notary's status authenticated by legalization—the process by which legal documents are certified in order to facilitate the documents' recognition and use in foreign jurisdictions.

With respect to Canadian documents, legalization is accomplished through diplomatic channels—first by submitting the original documents to Foreign Affairs, Trade and Development Canada in Ottawa for authentication. As mentioned above, the original documents must be signed and sealed by a Canadian notary. Before the clients execute the powers of attorney, it is important to consider whether French translations may be required for use in France. If so, translations must be prepared in advance by a certified translator and both the English and French versions must be signed by the clients and the notary. Once the documents have been authenticated by the Canadian

government, the diplomatic “chain of legalization” will be completed by submitting the documents to the French Embassy or Consulate General of France in Canada in order to have the signature of the Canadian government official authenticated (or submitted to the appropriate high commission in the case of Commonwealth countries). Once authenticated by French officials, the documents will be considered legalized for use in France.

If, however, the documents originate from and will be used in jurisdictions that are each parties to the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents,* the simplified Apostille process may be used. Similar to the legalization process, an Apostille only certifies the authenticity of the signature and capacity of the person or authority signing the document—it does not certify the content. The Apostille process only applies, however, if the document is considered a *public* document as determined by the law of the issuing country. Presumably if the document is not, at law, a public document of the issuing country, the lengthier legalization process would need to be used instead.

U.K.: In the U.K., two “lasting” powers are required—one for property and the other for health care, and the form for each is prescribed under the *Mental Capacity Act, 2005*. A certificate provider who is an independent person must certify that the donor understands the Lasting Power of Attorney and is signing it voluntarily. The Lasting Power of Attorney is not valid unless it has been

registered with the Office of the Public Guardian, and cannot be used until registration is completed.

Turkey: You confirm there are no simple parallel documents for use under Turkish law which survive incapacity, although Turkish law does provide for powers of attorney. One approach is to have the Ontario powers of attorney sworn before a Notary, which can be legalized as described above, with the objective of attempting to secure its recognition in Turkey.

After several weeks of corresponding with counsel, all of the documents are executed and finalized, and at some considerable cost. However, the alternative of not having proper incapacity planning would be disastrous and extremely expensive, possibly including court proceedings in six different jurisdictions, two of which are not common law and where English is not an official language, had there been no powers of attorney in place. Your client appreciates your efforts and you have been careful to keep them up to date throughout the process and inform them of the importance of this planning.

CONCLUSION

Incapacity planning will move increasingly to the forefront in estate planning, and with that an understanding of powers of attorney, their importance, and how best to structure them will correspondingly increase in importance as well. But this understanding must go beyond domestic borders to encompass any jurisdiction

where our clients decide to spend time periodically or own assets, requiring in many cases multiple powers of attorney given the lack of harmonization of our rules across borders.

Developments in the European Union show progress that can be made in making a domestic power of attorney mobile, with application in other jurisdictions, but as well the reality of the limits of this approach must be appreciated, particularly where the local law may not give effect, including in the face of public policy considerations.