

Powers of Attorney

Powers of attorney and advanced care planning: Property

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(July 31, 2019, 9:14 AM EDT) -- Statistics show many Canadians are living with disabilities and many will have a long-term disability. Coupled with our aging population, there is a serious need for everyone to have properly planned for incapacity. This series of articles discusses powers of attorney and the practical considerations in planning for incapacity using them.

Our first article reviewed the legislative framework in Ontario for powers of attorney, reviewed the two most common types in Ontario and discussed what happens if you don't make powers of attorney prior to becoming incapable. This article considers important issues involving continuing powers of attorney for property.

When does POA for property come into effect?

You can specify that your continuing power of attorney for property comes into effect only upon a specified event (for example, if you are assessed as being incapable of managing property), or that it is effective immediately.

Because of the difficulties which often arise in establishing to third parties (such as banks and other financial institutions) that a person is incapable of managing his or her financial affairs and that a continuing power of attorney for property is in effect, continuing powers of attorney for property are usually prepared to have immediate effect. To avoid misuse, they can be held by a trusted third party (such as the law firm which prepares it) with a direction providing the terms upon which it may be released.

Providing direction for property decisions

Continuing powers of attorney for property may be either general or limited. A general power of attorney for property can grant the attorney for property broad authority and contain no restrictions on the purposes for which it may be used. On the other hand, a limited power of attorney for property may be restricted to particular assets or a specific transaction period of time or provide special directions for the management of your financial affairs.

For example, if you are selling an asset but are going to be away on the closing date, you may grant a limited power of attorney for property to another person to act on your behalf on the sale of the asset for the period of time while you are away. Other examples of limited powers of attorney for property include those which provide for the sale or retention of specified assets should the grantor later become incapable, or those which provide specific investment guidelines for the attorney. In addition, if you have signed a continuing power of attorney for property at

your bank, it is limited to dealing with matters at that particular bank and is ineffective to deal with your other assets.

In some circumstances, it may be appropriate to have multiple continuing powers of attorney for property. For example, a person may grant both a general power of attorney for property to his or her spouse and a limited power of attorney for property to a business colleague restricted to the operation of the business.

It is important to note that the authority of your attorney ("attorney" in this regard means a substitute decision maker) to deal with your assets outside of Ontario will depend on the nature of the asset and the jurisdiction in which it is located. It may be appropriate to have a continuing power of attorney for property for assets in each jurisdiction. If you have multiple powers of attorney, it is also important to ensure that they work seamlessly together, for example by not having one unintentionally revoke another.

Choosing an attorney for property

Under the Ontario *Substitute Decisions Act, 1992* (SDA), a person must be at least 18 years old and mentally capable to grant a continuing power of attorney for property. The person(s) you select to act as your attorney(s) for property must be at least 18 years old and mentally capable. If you appoint two or more attorneys, your attorneys must act jointly unless the continuing power of attorney for property provides otherwise. You may also name one or more alternate attorneys to act should the primary attorney(s) you choose not be able to act or to continue to act.

In choosing a person to manage your property should you be incapable of managing it yourself, it is important to consider the nature of your assets and financial affairs and the ability of your proposed attorney for property to manage them. If you have a spouse and adult children and your assets and financial affairs are relatively straightforward, you may consider appointing your spouse as the primary attorney for property and your adult children as the alternate attorneys. If you have complex business interests, the handling of which your spouse finds daunting, you may wish to consider appointing your spouse and one or more others to act jointly as your attorneys, or you may wish to grant a general power of attorney to your spouse and a limited power of attorney to one or more business colleagues, restricted to the operation of the business.

If you are thinking of appointing two or more attorneys to act together, for practical reasons a maximum of three attorneys is generally advisable. You should also carefully consider the compatibility of your proposed attorneys and their ability to work together. In some circumstances, it may be appropriate to consider appointing a trusted adviser or trust company, either alone or together with others, to manage your assets and financial affairs.

Example:

Consider the situation where Doug is married to Rita and they live in Oakville. Doug and Rita hold their home, some bank accounts and their investment portfolio jointly. The couple has twins who are 15 years old, Alyssa and Claire. Doug and his sister Mary inherited an interest in several commercial properties from their father from which they receive an income; Doug and Mary hold their interest jointly. Doug wishes to prepare a continuing power of attorney for property.

Doug may consider granting a general power of attorney for property to Rita. Given that his daughters are young, Doug may wish to appoint alternate attorney(s) such as his sibling for now, with the idea of revisiting the appointment of his daughters as alternate attorneys when they are older. In relation to the commercial properties, Doug may consider granting a limited power of attorney for property to Rita and Mary jointly so that they will act together with regard to his interest in the properties, or he may wish to grant the power to Rita alone, and appoint Mary as an alternate attorney for property.

This is part two of a five-part series. Read part one: Powers of attorney and advanced care planning: Disability.

Our next article will continue considering important issues involving continuing powers of attorney

for property.

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