



A Common Sense Approach to Powers of Attorney for Property

Today people live longer than before. It is estimated that the number of Canadians over age 65 is close to five million and the number of centenarians at almost six thousand - the highest ever. If you are a member of this group (and even if you are not), estate planning is a critical component of good financial planning. Estate planning includes dealing with what happens if you are alive but unable to take care of your financial assets as well as looking after what happens when you die. In the first instance documents called Powers of Attorney for Property* are essential. Understanding what these documents are and why they are essential is an important step in the estate planning process.

What is a Power of Attorney for Property?

A power of attorney for property is a legal document authorizing one or more individuals, an institution such as a trust company, or a combination of the two to act on your behalf to manage your property. The person named in the document is called the “attorney” or “substitute decision maker” and the person giving the power is called the “donor” or “grantor”. The document allows the attorney to take care of your financial assets. He can take money out of your account for you, pay your bills, deal with investment decisions, continue any planned giving arrangements you have in place, manage rental properties and generally look after your financial property.

Powers of attorney can be unlimited, giving the attorney the broad right to manage your property, or restricted, where the attorney can only act for a specified time or for a specific event. An example of a restricted power of attorney is one given by a bank where the power is restricted to transactions within that bank. An example of an unrestricted power is one given to an individual authorizing them to look after your affairs, including in the event that you become incapacitated. Generally unlimited powers of attorneys should also be continuing or durable. A Durable or Continuing Power of Attorney stays in effect once the donor becomes incapacitated. All provinces other than Quebec allow this document.

Who should be my Attorney?

Understanding the responsibilities of an attorney will facilitate making the choice of who to appoint. Although the power of attorney for property is often used as a tool of convenience or for a specific purpose, the person named as the attorney may ultimately be responsible for all of your property at a point in your life when you are unable to look after your affairs yourself. Depending on the wording of the power of attorney, they will likely also have the ability to deal with your affairs from the day you sign the document. Accordingly, this person should be very trustworthy and experienced in financial matters.

Generally the responsibilities of an Attorney include:

- Keeping an account of all transactions concerning your property under management; this property should only be used for your benefit or in your best interests.
- Taking care of your expenses and the financial obligations of any legal dependents. The attorney should manage your property keeping in mind the terms of your will. If your will includes a gift of specific property, the attorney should do his best to retain this property unless it is needed for your wellbeing and benefit during your life.

*Called an Enduring Power of Attorney in Alberta, British Columbia, Manitoba, Newfoundland, Saskatchewan and Yukon; and a Mandate given in anticipation of Incapacity in Quebec.

- Managing your financial assets including investments, real estate, bank accounts and other financial assets. The attorney ought to maintain a close relationship with your attorney for personal care who is responsible for making personal care decisions. For example, your personal care attorney would need to understand how much to spend on your living expenses and would have to liaison with your attorney for property to determine the budget. If it is in your best interest to have around the clock care this must be explored even if it means minimizing the estate you leave behind.
- Consulting from time to time with you and supportive family members and friends. The attorney must do his best to keep you in touch with your family and friends and must involve you in as much of your decision making as possible.

What happens if there is no Power of Attorney for Property?

In Ontario adult persons are presumed capable unless proven not to be so. If you do not have a power of attorney for property a court application must be made to have someone appointed as your Guardian or the Public Guardian will assume the responsibility. The appointment of a Guardian through the Courts begins with the formal proving of mental capacity. This can be quite difficult in personal terms as, even though you may not be fully competent, you could oppose the application. Cost would also be a factor as lawyers have to be involved. The most disturbing aspect of not appointing an attorney while you are able to do so is that a complete stranger may end up deciding who looks after your property.

Mrs. Smithson's story

Consider the case of Mrs. Smithson, who was 92 years old and lived in her own home with the aid of a caregiver, Harriet, for many years. Her family was busy and, although loving, did not live close by. They were sure that she was being well taken care of by Harriet. Harriet had been appointed attorney for property many years ago when Mrs. Smithson first needed assistance in taking care of her finances. Over the years she carried on with Mrs. Smithson's help and direction. Now that Mrs. Smithson was incapable she could no longer oversee and approve Harriet's actions. After some time, funds went missing.

Harriet was not as prudent as she should have been and dipped into Mrs. Smithson's funds for personal reasons. The very unpleasant situation was subsequently controlled by Mrs. Smithson's family. Had Mrs. Smithson's family ensured that her documents were up to date, Harriet would not have misused her authority and Mrs. Smithson's assets would have been better protected.

Ben's story

Consider the case of James and his father, Ben. James was Ben's only son and the sole beneficiary under his will. Recently Ben included James on the registration of the title of his condominium as joint tenant with the right of survivorship. Shortly thereafter, Ben suffered a stroke and was deemed incapable. James moved Ben into a nursing home and listed the condo for sale, thinking that as joint owner and sole beneficiary of his father's estate he could take care of everything. In fact because Ben was still alive someone had to sign off on the sale on his behalf. James could not do so because there was no Power of Attorney for Property in place giving that legal authority to James. What occurred was a "real nightmare" for James. James engaged a lawyer to have himself appointed as Guardian for Ben. This meant that Ben had to go through a capacity assessment before the doctor would certify him as incapable. This was extremely stressful for him and costly, both in terms of time and money.

Final Words

Powers of attorney for property are essential and powerful documents. They are needed to ensure that your finances are managed if you do not have the mental capacity to do so yourself. They place all of your assets under the control of someone at a time when you are vulnerable. When considering who to name as an attorney consider her character, your needs and your intuition about her personality and character; if trusting this person does not come easily to you, you are probably making an unsuitable choice. In instances where there is no one appropriate, it may be wise to consider a professional trustee. Although perceived as impersonal and objective, a professional trustee is fair and subject to such strict scrutiny you can be sure that your property will be well taken care of. Although finding an attorney may not be easy, it is far better to appoint your best choice rather than leave such a choice up to the decision of a complete stranger.

Bibliography:

1) <http://www.attorneygeneral.jus.gov.on.ca>

2) Foster, Sandra, E. - *You can't take it with you- Common-Sense Estate Planning for Canadians*, Toronto, Wiley and Sons, 2007.

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