The Mighty Power of Attorney for Property

A comprehensive estate plan addresses important issues related to your property that impact you and your family throughout your lifetime, as well as after your death. Such comprehensive planning includes addressing your potential incapacity during your lifetime. The granting of authority to someone else to manage all of your financial affairs, and property worldwide, while you are unable to make decisions regarding the management of your property and financial affairs, is critical related to your property and financial affairs.

What is a Power of Attorney for Property?

In the event of incapacity, someone must "step into your shoes" and become your substitute decision maker. Your substitute decision maker will have the authority to make decisions with respect to the management of all of your all of your property which you own personally. Property that is held in a trust for your benefit would not fall under the authority of your substitute decision maker but rather, would remain under the management of the trustee of that trust.

While some individuals plan for incapacity by transferring property to joint tenancy with right of survivorship, to a trust, or to a holding corporation, the most effective strategy is to use a Continuing or Enduring Power of Attorney for Property, or Mandate (in Quebec), ("POA"). The appointed attorney (in Canada, attorney does not mean a lawyer) who is named in the POA document acts as the substitute decision maker for the grantor – the person who granted the POA – with respect to all property owned by the grantor personally, during the grantor's lifetime, worldwide. The POA is in effect only during the lifetime of the grantor. It expires at the death of the grantor.

Dos and Don'ts

If you accept the appointment as attorney under a POA, perhaps for your parent, sibling, other close relative or a close friend, you take on a fiduciary duty towards the grantor, and in addition to the expectation that you act honestly and in good faith with respect to the grantor's property, you will be obliged to comply with the laws of the province in which the grantor resides. These provincial laws place obligations and prohibitions on you as the acting attorney to ensure that you are acting in the grantor's best interest. The grantor's best interest includes providing for the grantor's dependants. There are certain acts which the attorney must make on behalf of the grantor, as well as certain acts which the attorney must refrain from doing. For example, the attorney is expected to know the contents of the grantor's Last Will and Testament ("Will"), and not violate the Will. That is, the attorney must refrain from transferring out of the grantor's ownership any property that is spoken for in the Will (unless the grantor requires the assets for his or her financial support or use). The obligations and prohibitions imposed on the attorney differ, depending on whether the grantor is capable, or incapable.

A brief list of the attorney's DOs and DON'Ts where the grantor is incapable, includes:

- Act with Honesty, Integrity, and in Good Faith – Consider all the relevant factors before making a decision, absent of self-interest.
- Do Not Mingle Funds – An incapable grantor's funds must never be mingled with anyone else's funds.
- Do Act in the Grantor's Best Interest – Ensure that your actions benefit only the grantor and, in certain circumstances, the grantor's dependants.
- Do Not Execute a Will or Codicil – An attorney cannot execute a Will or Codicil, on behalf of an incapable grantor.

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- Do Comply with the Will – Know the contents of the grantor's Will and any other testamentary dispositions (beneficiary designations on life insurance policies and registered plans), and ensure that your decisions and actions do not contradict these known intentions.
- Do Not Make Beneficiary Designations – An attorney cannot designate a beneficiary on a life insurance policy or registered plan, on behalf of an incapable grantor. In circumstances of spousal separation, conversion of RRSPs to RRIFs, or acquisition of life insurance policies, only a capable grantor can execute documents pertaining to the succession of property or beneficiary designation. Where the grantor no longer has testamentary capacity (that is, does not have the cognitive capacity to make a Will), these documents cannot be executed because the attorney has no authority to do so.
- Do Report and Provide an Accounting To The Grantor – If the grantor is capable, obtain his/her approval and consent on **all** decisions. If the grantor is incapable, encourage his/her participation in the decision making process. Explain your actions and review your records with the grantor. Provide an account to the grantor, regardless of the degree of capacity, and maintain confidentiality.
- Do Maintain Records – Document your actions. Keep receipts. Document all transactions.
- Do Not Initiate Significant Transfers of Property – Refrain from entering into a self-interested transaction. Depending on the circumstances of the situation, an attorney cannot transfer significant funds or property belonging to an incapable grantor to himself/herself, or to his/her spouse, children or grandchildren, **unless** the transfer is the result of a transaction that had already begun while the grantor was capable, or for which there is evidence of prior customary conduct.
- Do Facilitate Family Harmony, Participation – Discuss and consult with the grantor's close family members where appropriate.
- Do Not Transfer to Joint Tenancy with Right of Survivorship Between the Grantor and Attorney and/or Others – Refrain from transferring property to joint tenancy with right of survivorship since such a transfer is not likely to be in the grantor's best interest, and, may be a self- interested transfer.

An incapable grantor is vulnerable and must rely on his/her attorney for all decisions regarding financial matters. As such, the obligations and prohibitions imposed on an attorney are designed to protect the grantor from fraud and financial abuse. If you are acting as an attorney under a POA, and face a dilemma regarding a contemplated action (to do, or not to do?), use the "best interest" of the grantor test as your guide. You may also want to consult with your estate lawyer to seek and obtain legal advice on the matter.

Attorney Liability

The potential personal liability of the attorney for financial damages to the grantor during the grantor's lifetime or to the estate of the grantor (after the grantor's death), and consequently to the beneficiaries of the grantor's estate, has been the subject of extensive POA and/or estate litigation. The decisions of an attorney are subject to challenge and where there is demonstrable non-compliance with the prescribed duties of the attorney under the law, the acting attorney may incur personal liability. Consider these court cases which serve to highlight the dilemmas which attorneys may face when acting for a capable grantor.

In the 2005 case of Fareed v. Wood, the judge held that where a grantor is capable, an attorney who assumes any decision-making functions triggers full responsibility for all actions with respect to the grantor's property, whether the actions were taken by the attorney or the grantor. In Fareed, the court imposed liability on the attorney for transactions undertaken by the grantor without the knowledge of the attorney. The court was critical of the attorney for failing to monitor gifts made by the grantor to third parties under suspicious circumstances.

In contrast, the 2006 decision in McMullen v. McMullen, while not binding in Ontario, instructs that an attorney may be held liable for losses, including legal fees or other costs associated with actions taken to protect the capable grantor's property, if those actions are taken without the grantor's consent. The court held that even where the attorney is acting in the (perceived) best interests of the grantor, the attorney must not act without the knowledge and consent of the capable grantor. If the attorney fails to obtain the grantor's consent, he or she breaches the duty to account, the duty to act in accordance with the grantor's intentions and wishes, and the duty to not undermine the grantor's independence.

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These decisions may have a chilling effect on the readiness of attorneys to exercise their authority when invited to do so by a capable and willing grantor. If acting while the grantor is still capable, and, depending on the direction in which circumstances develop, before long an attorney may find himself or herself in a "catch-22" situation, ultimately heading towards litigation. It may be in the best interest of the attorney to not act as attorney, while a grantor is still legally capable.

Acting as Director

Often a grantor is the sole Director of a private corporation. Once incapable, the grantor can no longer perform his or her Director functions. It is assumed by some that the granting of a POA authorizes the attorney to act as Director, during a time of incapacity. This assumption is misguided. The POA grants authority to the attorney to step into the shoes of the grantor with respect to ownership of property and decision making regarding the management of that property, as "shareholder". In the corporate context, this means that the attorney steps into the shoes of the grantor as owner of the shares, and therefore can vote on those shares, and can deal with the shares in any manner which the grantor, if capable, could. The attorney steps into the shoes of the grantor, with respect to the grantor's corporate interests, namely, the shares of the private corporation owned by the grantor. In that capacity, the attorney has legal ownership of the bundle of rights attached to such shares. The attorney has the authority to sell, transfer, and vote on the shares, on behalf of the grantor.

Directorship of a corporation however does not constitute "property" and herein lies the rub. Where the grantor is a sole Director of the corporation, the attorney does not step into those (Director) shoes of the grantor. The attorney has no authority to act as Director on behalf of the grantor. In such circumstances, where the (now incapable) grantor is the sole shareholder (or, if there are other shareholders, then, with the consent of the other shareholders), the attorney, in his capacity as shareholder, can elect himself or herself (or to be elected by the other shareholders) to be a Director and act in that capacity.

Tax Considerations

Although this is not settled law, where an attorney steps into the shoes of a grantor as a controlling shareholder pursuant to an unconditional POA, and, where the attorney is a controlling shareholder of another corporation, the CRA may deem the two corporations to be associated, thus reducing the availability of the Small Business Deduction to each corporation. Where the POA document states that the POA is effective conditionally, that is, that it can be invoked only upon incapacity of the grantor, the deemed association does not apply prior to the time of incapacity.

Conclusion

The POA is an indispensable instrument in estate planning. However, if not carefully considered and cautiously implemented, it may give rise to unexpected consequences. Added to the known dangers of fraud and abuse, there are traps of a more subtle nature, namely, the shortcomings of the POA in the corporate governance and succession context. It is recommended that prior to the granting a POA, particularly where the grantor owns corporate shares, legal and tax advice be obtained.

For more information, speak with your BMO Wealth Management professional.

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