STANCER GOSSIN ROSE LLP
LAWYERS • MEDIATORS

SPRING 2018 - ESTATE ADMINISTRATION NEWSLETTER

Avoiding Guardianship Litigation with Carefully Considered Powers of Attorney

By: Ashley Doidge
Associate at Stancer Gossin Rose LLP

With Canada's aging population, there has been an increase in disputes within families about who should be making personal and financial decisions on behalf of incapable members of the family.

Many of these disputes could be avoided with properly drafted Powers of Attorney.

In Ontario, there are two common Powers of Attorney: 1) a Continuing Power of Attorney for Property; and 2) a Power of Attorney for Personal Care.

While a Will directs what will happen to your assets after you pass away, Powers of Attorney stipulate who will make decisions about your assets while you are alive, and who will make decisions about your personal care when you are alive but unable to make the decision for yourself. The person(s) who is named is referred to in the documents as the "attorney". Note, the attorney does not need to be lawyer, and often is a family member or friend.

Without a Power of Attorney for Property, when you become incapable of managing your property, nobody except the Office of the Public Guardian and Trustee will be able to manage your finances unless a court application is commenced. Such court applications can be inconvenient and expensive. Needless to say, the person you would have chosen to do this job for you may not be the person the court appoints.

Without a Power of Attorney for Personal Care, when you become incapable of making personal care decisions, legislation takes effect which provides a list of potential substitute decision makers in a hierarchy. Note that the list includes the incapable person's "spouse" or "partner" before the incapable person's child. Hypothetically, a situation could occur where an incapable person's boyfriend or girlfriend could have the legal authority to make important personal care decisions instead of the incapable person's adult children. Alternatively, another hypothetical situation which could occur if there is no Power of Attorney for Personal Care is that an estranged relative might have the right to make personal care decisions for the incapable person.

Who and How Many Attorneys Should You Name?

While it may seem like a straightforward decision to name one child over the others for simplicity, it may be viewed by your other children as a symbol of favouritism. For this reason, many people decide to name all their children. If you name more than one attorney, you can designate whether you want them to act "jointly" or "jointly and severally." The main advantage of naming attorneys jointly (which requires unanimity) is that there are checks

and balances, whereas if the attorneys are named jointly and severally, each of them can technically make decisions on your behalf without consulting the other. The main hurdles with jointly-appointed attorneys will be the unavailability of one attorney, the inconvenience of requiring all attorneys to make each decision together (which means all the attorneys may need to go to the bank to withdraw funds, for example), and the possibility of having a disagreement among an even number of attorneys, leaving them deadlocked.

To proactively deal with these potential issues, we recommend that each client consider providing a "majority rules clause" in their Powers of Attorney, which outlines that a majority of attorneys can act. Alternatively, a client may want to name an additional attorney to act as a tie breaker when there are disputes about managing property.

Note that if your attorney is a US resident, you may want to get legal advice about the following potential complications:

- Affected status of a Canadian Controlled Private Corporation (CCPC);
- Canadian brokerage institution insisting that the attorney liquidate the investment portfolio which may give rise to potentially accelerated capital gains;
- If your attorney has signing authority over a Canadian account, they may be required to report annually to the Department of the Treasury by electronically filing a Financial Crimes Enforcement Network (FinCEN) 114 and a Report of Foreign Bank and Financial Accounts (FBAR).

What to do if you have been named as an Attorney for Property?

1) Determine if you want to act as the attorney or if you want to renounce;

2) Meet with a lawyer to obtain advice as to whether your authority is triggered or whether you need to obtain medical evidence to support your authority to act;

If you decide that you want to act:

1) Collect a full list of assets and liabilities of the incapable person;

2) Obtain legal advice about the duties of attorneys for property;

3) Obtain a copy of the last Will and Testament and do not dispose of property that is subject to a specific testamentary gift unless it is necessary to comply with your duties; and

4) Keep detailed accurate records of your activity and be sure to keep all receipts for expenses.

Note to Professionals: Use Caution When Presented with a Power of Attorney for Property

If you are presented with a Power of Attorney for Property, be sure to:

- obtain an original or notarized copy;
- ascertain whether the attorneys are named jointly or jointly and severally;
- determine whether the Power of Attorney is effective in Ontario;
- be sure to read the document to see if the grantor provided specific restrictions on the authority of the named attorney;
- identify the attorney named by taking photo ID for your file;
- take reasonable precautions to discover and avoid fraud and determine the authenticity of the document (some case law suggest making inquiries as to whether the grantor is alive, if they had ever revoked the power of attorney, or if they were mentally competent when the power of at attorney was signed);
- And consider obtaining legal advice.

If the grantor is deceased, the Power of Attorney document is no longer valid and the attorney loses their ability to manage the assets of the grantor and to give instructions to third parties using the document.

Stancer Gossin Rose LLP / ADR@SGR

1210 Sheppard Avenue East, Suite 310● Toronto, Ontario M2K 1E3 ● 416-224-1996 ● www.sgrllp.com

SUMMARY OF TYPES OF POWERS OF ATTORNEY

A Continuing Power of Attorney for Property is a legal document which gives someone else the legal authority to make decisions about your finances. Using the document, the attorney may be able to manage your property and make decisions including: • selling your home; • obtaining a mortgage; • withdrawing funds from your bank account; • instructing your investment advisor; • filing tax returns; • instructing counsel on your behalf if you become involved in litigation; • gifting your grandchildren wedding and birthday gifts; and • making donations to charity**.** The Power of Attorney is called "continuing" because it can be used after the person who gave it is no longer mentally capable to make the financial decisions themselves. Note that this document can also be used by the attorney when you are capable, but unable to act--for example, if you are away in Florida for the winter and you need something to be signed at home in Toronto. **[**You can also create a **Non-Continuing Power of Attorney for Property** which is a legal document which gives someone else the legal authority to make decisions about your finances, but, in this case the document cannot be used if you become mentally incapable.]	**Power of Attorney for Personal Care** is a legal document in which one person gives another person the authority to make personal care decisions on their behalf if they become mentally incapable. Using the document, the attorney may be able to make the following decisions: • whether you live in a Jewish nursing home such as Baycrest or a secular nursing home or at home with live in support; • what kind of medical treatment you receive; and • what you eat. Many clients include boilerplate instructions about their wishes with respect to end of life treatment. Some clients may wish to consult with their Spiritual Advisor to discuss drafting a religiously-oriented Power of Attorney.

Stancer Gossin Rose LLP / ADR@SGR

1210 Sheppard Avenue East, Suite 310● Toronto, Ontario M2K 1E3 ● 416-224-1996 ● www.sgrllp.com