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Creating a Power of Attorney for Property in Ontario: What you Need to Know

This article discusses the issues you need to consider when creating a Power of Attorney for Property in Ontario.

A Power of Attorney for Property, along with a Will and a Power of Attorney for Personal Care, make up the basic estate document package in Ontario. You can access our Blog article which discusses creating these documents by visiting our web-page, or you can email us your request and we will send you a scanned copy of the document to you by return email.

What authority does a valid Power of Attorney for property give to the person chosen?

Unless restricted by the clear language of the document, the authority given to the person appointed as your attorney is very broad and will include the authority to make most legal and financial decisions that you can make yourself. The one exception is that it does not grant the person you have chosen the power to make a Will on your behalf.

In addition, provided the appropriate wording is used as specified in the Ontario statute authorizing the creation of these documents which is called the Substitute Decision Act (the "SDA"), the authority will survive any subsequent legal incapacity by the grantor. In other words, if you become unable to look after your financial and legal affairs, your attorney will have the full legal authority to do so on your behalf. The only statutory requirement is that the attorney you appoint must be at least 18 years old.

The authority granted in the document can be restricted and in some cases such as those discussed below, it may make sense to appoint different persons with their authority limited to specific functions required by your estate. However, you want to make sure that someone has the authority to deal with all your affairs.

What factors should be considered in choosing an Attorney for Property?

However, given the broad powers an attorney for property is granted under the SDA, the clear implication is that you should have utmost faith and trust in the person you are choosing.

However, trust is not the only consideration. You should also consider whether the person you are choosing has the necessary expertise to deal with your affairs. Everyone is different. For some people, the only thing that your appointed attorney may be required to do is ensure that whatever income you have is deposited to the account where your monthly bills are paid from and file your annual tax return.

However for other people, especially the self-employed, the tasks and expertise needed may require special knowledge and skill. If this is the case you may want to consider appointing more than one attorney with the scope of authority for each being clearly specified in the documents that grant the power. These documents have to be worded carefully as the general rule is that creating a new power of attorney unless otherwise specified will revoke a prior power of attorney.

Another important consideration is the residency of a potential attorney you have in mind. There is the obvious issue that a person not living in close proximity to you will have problems dealing with matters that you do daily such as picking up your mail but may be faced with other regulatory issues. For example, if a US person is appointed to act as the attorney for property, a Canadian investment advisor must be licensed with the US Securities and Exchange Commission to take instructions from the attorney. This may make it very difficult for the US-resident attorney for property to manage and provide instructions to a Canadian investment advisor.

Another hidden issue lies in the Canadian Income Tax Act's "associated corporation" rules. If you operate your business via a corporate structure, and you appoint a person to look after your business interests who is also incorporated, this may result in this person's corporation and your corporation being "associated" which will limit the availability of the small business deduction. This can lead to a situation where the tax rate on your business income jumps from 12.5% for qualifying small business income to almost 50% for not non-qualifying income.

What compensation is your appointed attorney entitled to?

Persons fulfilling the function granted under a power of attorney for property, like estate trustees, are entitled to compensation for their services. Section 40 of the SDA codifies the attorney's right to compensation. It states that "...A guardian of property or attorney under a continuing power of attorney may take annual compensation from the property in accordance with the prescribed fee scale."

Pursuant to a Regulation enacted under the authority of the SDA, "the prescribed fee schedule" has been set as follows,

- a. 3% on capital and income receipts;

- b. 3% on capital and income disbursements; and
- c. 3/5's of 1% on the annual average value of the assets as a care and management fee.

These percentages are slightly higher than the usual “rule of thumb percentages” awarded to a trustee or estate trustee, which are typically expressed as 2 1/2% on receipts and disbursements, and 2/5's of 1% as a care and management fee respectively. However, you change the compensation you wish to pay the attorney in the document itself.

Key Take-Away

The basic estate package in Ontario for every individual consists of a Will, a Power of Attorney for Property, and a Power of Attorney for Personal Care. Having a lawyer create these documents for you is not expensive. However, if you do not have these documents in place when they are needed, or your wishes are not clearly expressed, the cost can be significant to have the legal authority these documents grant determined by a judge on application to a court.

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