TD Wealth

Understanding Continuing Powers of Attorney

Similar to a Will, a Continuing Power of Attorney is an essential component of an estate plan - a document that you hope you will never need and yet you cannot be without. Whereas a Will takes effect upon the testator's death, a Power of Attorney is utilized during the grantor's lifetime. This article takes a closer look at the different types of Powers of Attorney and in particular the Continuing Power of Attorney for Property.

Types of Powers of Attorney

A **Power of Attorney** is a legal document in which you (the "grantor") grant the person or corporation named as attorney the power to make decisions on your behalf while you are still alive.

Under normal circumstances, a power of attorney automatically terminates upon the grantor's death or loss of mental capacity. However, all Canadian provinces have enacted legislation to provide for **Continuing or Enduring Powers of Attorney**, which permit the attorney to continue to manage the grantor's affairs even after the grantor's loss of mental capacity. As people are on average living longer now; coping with the incapacity that comes with age, illness or accident is often a reality of life. For this reason Continuing Powers of attorney have become an indispensable part of modern estate planning.

There are two types of continuing powers of attorney.

A **Power of Attorney for Personal Care** authorizes the attorney to make decisions of a personal nature on behalf of the grantor, which include decisions relating to hygiene, nutrition, shelter and clothing. Whereas a continuing power of attorney for property may become effective before the grantor becomes incapacitated, a power of attorney for personal care only comes into effect upon the grantor's incapacity.

A **Continuing Power of Attorney for Property** authorizes the attorney to make decisions of a financial nature (such as selling securities or real estate and conducting banking activities) for the grantor, and such authority continues even if the grantor becomes mentally incapable.

Many people equate a power of attorney for personal care with a living will. There are, however, some subtle differences. Whereas a power of attorney for personal care is a legal document in which specific person(s) is/are named as attorney, a living will is a document in which you make known your wishes regarding the type and intensity of medical treatment you wish to receive or not receive when you become incapable of making the decision. There is no need to have specific attorney(s) named in a living will. A living will is sometimes referred to as an advance health care directive, and can be included in a power of attorney for personal care but can also be a separate document.

A power of attorney for property can be either general or specific:

- With a **General Power of Attorney,** the grantor confers on the attorney wide powers to deal with all assets.
- With a **Specific or Limited Power of Attorney**, the attorney's authority can be restricted in terms of time or purpose. For instance, you may execute a specific power of attorney if you plan to be out of the country for a few months and wish to appoint an attorney to sell a piece of real estate for you during your absence.

In the following discussion, our emphasis is on the **Continuing Power of attorney for Property**.

Extent of the Attorney's authority

The extent of an attorney's authority under a continuing power of attorney depends upon the terms set out in the document. As discussed above, the authority of the attorney can be very broad, as in a general power of attorney, or very limited in scope.

Limitations:

Estate Planning

No matter how general in scope the terms of the document are, an attorney is not permitted to make, change or revoke a Will on behalf of the grantor.

This prohibition regarding the making of a Will also extends to altering documents that have testamentary implications. Thus, an attorney cannot make or change the designated beneficiary on an RSP, a RIF, a pension plan or an insurance policy.

Fiduciary Duty

An attorney has a fiduciary duty to the grantor. Accordingly, the attorney is required to exercise reasonable care and not to permit his or her personal interests to conflict with those of the grantor.

Factors to consider in selecting an attorney

Trust

In deciding whom to appoint as your attorney, the most important consideration is trust. You should have absolute trust that the attorney will always act in your best interest. After all, depending on the scope of the power, the attorney may have full access to your assets. For the same reason, judgment, knowledge and skill are also important factors.

Avoiding conflict of interest

In situations where the appointment of a specific family member may create discord within the family, you may consider to appointing a trust company.

How many?

You can have more than one attorney. However, if this is the case, you should state clearly whether the attorneys should act unanimously, or "joint and severally", the latter meaning that each of your attorneys will be able to act alone on your behalf. [Note: some financial institutions only accept powers of attorney with joint and several authority.]

Rather than having multiple concurrent attorneys, you may opt instead to appoint a single attorney with an alternate named to take over in case the primary attorney dies or becomes unable to act.

When does a continuing power of attorney come into effect?

Unless the document provides otherwise, a continuing power of attorney comes into effect immediately after it is properly executed. Since a continuing power of attorney is often intended to be used only in the event of the grantor's incapacity, you may prefer to provide in the document that the attorney's power is effective only upon the happening of a contingent event (*i.e.*, mental incapacity of the grantor). If so, it will be necessary to specify how such incapacity can be determined. One way to do this is to require a declaration of incapacity by a medical practitioner.

Other Considerations

Revocation

The grantor of a continuing power of attorney can revoke it so long he or she is mentally capable. The formal requirements of a revocation vary from province to province. In Ontario, for instance, the revocation must be executed in the same way as the power of attorney, *i.e.*, signed and witnessed by two people.

Multiple continuing powers of attorney

If you own properties in different jurisdictions, you will need to determine whether a continuing power attorney executed in one jurisdiction will be effective in another. For instance, if you live in Ontario but also own a property in Florida, you need to ascertain whether Florida legislation is broad enough to recognize a continuing power attorney executed in Ontario, and furthermore whether financial institutions and third parties there are willing to accept such a document.

Inadvertent Revocation

If it is necessary for you to execute more than one continuing power of attorney, in order to deal with properties situated in a different jurisdiction, care must be taken to ensure that the execution of a second continuing power attorney will not result in the inadvertent revocation of the existing one. This is because some provincial legislation (Ontario being an example) stipulates that a continuing power of attorney is terminated when the grantor executes a new continuing power of attorney, unless the grantor provides that there will be multiple continuing powers of attorney.

The same consideration applies when you are requested by a financial institution to execute their standard form power of attorney. If you already have a continuing general power of attorney executed in accordance with Ontario legislation, by subsequently signing a bank form power of attorney, you may be inadvertently revoking your existing continuing general power of attorney. This leaves you with the bank one, but that document will typically govern only assets held with the bank and not any of your other assets.

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