Harper Grey LLP

WILLS & ESTATES

What to Know Before Using a Power of Attorney (and Maybe you Need to Update Yours…)

Types of Power of Attorney

There are three main types of Power of Attorney that can be granted: a Limited Power of Attorney, a Power of Attorney that is not enduring, and an Enduring Power of Attorney. In BC:

1. a Power of Attorney is 'enduring' if it contains wording that specifies it continues to operate in the event of the incapability of the person granting the Power of Attorney. In the absence of express wording directing this, the Power of Attorney is not enduring and ceases to be valid.

2. a Power of Attorney is 'limited' if there are terms in the document that specify it is restricted to a particular purpose or time period.

Scope of Your Powers

In British Columbia the powers of an attorney are set by the *Power of Attorney Act* (the "**Act**") and the terms of the Power of Attorney document itself. In this information sheet, the person who made the Power of Attorney will be referred to as the 'grantor'. This information sheet applies to Enduring Powers of Attorney, and refers to them as "Powers of Attorney" for convenience.

1. Financial Affairs

In respect of the grantor's financial affairs, subject to the limitations imposed by the Act and the language of the Power of Attorney, the named attorney is empowered to make decisions on the grantor's behalf or do anything that the grantor may do by an agent.

Under the Act *financial affairs* has a specific legal meaning, which is broader than the common use of the term. "Financial affairs" includes the grantor's "business and property, and the conduct of the grantor's legal affairs".

Some of the most common examples of matters usually within the scope of this include paying the grantor's bills, the sale of property belonging to the grantor, and filing the grantor's tax returns

2. Gifts and Loans

The base principle in BC is that a grantor's attorneys may not make gifts, loans, or charitable gifts from the grantor's assets unless:

(a) the grantor will have sufficient assets remaining to meet the grantor's personal care and health care needs and those of any dependants the grantor may have, and to satisfy any of the grantor's other legal obligations, and

(b) when the grantor was capable, the grantor made gifts, loans, or charitable gifts of that nature, and

(c) the total value of all gifts, loans, and charitable gifts in a year is less than the lesser of 10% of the grantor's taxable income for the previous year, or $5,000, or the Power of Attorney document

provides authority to make gifts without this restriction.

Critically, the grantor's attorney is not permitted to make gifts or loans to themselves unless the document expressly permits it. Accordingly, if the Power of Attorney does not expressly allow this, this means that the attorney cannot transfer assets to the attorney's name, nor can the attorney make assets joint between the attorney and the grantor.

3. Hiring Professionals

An attorney is generally empowered to retain the services of qualified professionals to assist the attorney in carrying out the attorney's duties. An example would be that an accountant can generally be retained to prepare tax returns if reasonably required.

4. Health Care

It is important to note that the Power of Attorney does not extend to decisions in respect of the grantor's health care or personal care, such as whether to administer medical treatments or medication. This power has to be assigned separately using a Representation Agreement.

However, the attorney will be positioned to facilitate the payments that may arise in respect of health and personal care, and it therefore becomes extremely important that the named attorney collaborates with the person named as the health care decision maker under the Representation Agreement.

5. Will

A Power of Attorney does not confer the power to change, destroy, or a make a Will for the grantor. These are powers that cannot be assigned by the grantor and any Will made by the attorney on behalf of the grantor is invalid.

Your Duties as an Attorney

An attorney acting under a Power of Attorney has certain duties, which all flow from the fundamental obligation to act in the best interests of the grantor. These duties include:

1. Act Honestly

An attorney must act honestly and in good faith.

2. Act as a Reasonably Prudent Person

An attorney must exercise the care, diligence, and skill of a reasonably prudent person.

3. Act Within the Scope of their Powers

An attorney must act within the authority given in the Power of Attorney and in accordance with the Act.

4. Keep Records

An attorney must make a reasonable effort to determine the grantor's assets and liabilities as of the date on which the attorney first exercises authority on the grantor's behalf and must keep, and produce at the grantor's request, the following records:

(a) a list of such assets and liabilities,

(b) a current list of the grantor's assets and liabilities, including an estimate of their value if it is reasonable to do so,

(c) accounts and other records respecting the exercise of the attorney's authority under the Power of Attorney, and

(d) all invoices, bank statements, and other records necessary to create full accounts respecting the receipt or disbursement of income or capital on the grantor's behalf.

5. Act in the Grantor's Best Interests

When managing and making decisions about the grantor's financial affairs, an attorney must act in the grantor's best interests, taking into account the grantor's current wishes, known beliefs and values, and any directions to the attorney set out in the Power of Attorney.

6. Give Priority to the Grantor's Personal and Health Care Needs

To the extent reasonable, the attorney must give priority to meeting the personal care and health care needs of the grantor when managing the grantor's financial affairs.

7. Invest in Accordance with the *Trustee Act*

An attorney must invest the grantor's assets, if investments are made, only in accordance with the *Trustee Act* unless the Power of Attorney states otherwise. This legislation presently permits investment of the grantor's in any form of property or security in which a prudent investor might invest, including a security issued by an investment fund under the *Securities Act*. If investments are being explored, it is best practice for an attorney to consult with a qualified financial specialist prior to investing.

8. Foster the Grantor's Independence

To the extent reasonable, the attorney must foster the grantor's independence and encourage the grantor's involvement in any decision making that affects the grantor. The extent to which the grantor's involvement must be sought will often depend on the grantor's mental condition and any positive or negative impacts on the grantor's physical and emotional wellbeing of such consultations.

9. Not Dispose of Testamentary Gifts

The attorney must not dispose of property that the attorney knows is subject to a specific testamentary gift in the grantor's Will, except if the disposition is necessary to comply with the attorneys' duties.

As a result, it will typically be desirable for an attorney to review, or make reasonable efforts to obtain and review, the Will of the grantor to ensure that the grantor's wishes in respect of particular items are honored.

10. Keep Assets Available

To the extent reasonable, the attorney must keep the grantor's personal effects at the grantor's disposal.

11. Keep Assets Separate

An attorney must keep the grantor's property separate from the attorney's property, unless the Power of Attorney document expressly permits otherwise. A common example would be if real estate owned by the grantor was sold, the proceeds must be placed in an account solely in the grantor's name. Similarly, financial assets may not be changed to be joint with an attorney or transferred to an attorney's name.

12. Act Unanimously

If there is more than one attorney appointed and the attorneys have overlapping powers at the same time, they attorneys must act unanimously unless the Power of Attorney states otherwise. This does not generally apply where one attorney is an alternate to another named attorney.

13. Access to and Disclosure of Information

An attorney may request information and records regarding the grantor if the information or records relate to the grantor's incapability or an area of authority granted to the attorney, which usually would be restricted to matters in respect of the grantor's *financial affairs*.

Should the attorney obtain information or records in the exercise of the attorney's authority, the attorneys must not disclose such information except to the extent necessary to perform the attorney's duties, make an application to the Court, comply with an order of the Court, or make a report to the Public Guardian and Trustee (the "**PGT**"), or comply with a requirement of the PGT.

14. Delegation

An attorney cannot delegate his or her decision-making authority and duties unless expressly permitted by the Power of Attorney. Nevertheless, the Act permits all attorneys to delegate all or part of their authority in relation to investment matters provided that they delegate to a qualified investment specialist and that the delegation meets the following requirements:

(a) the delegation must be only to a degree of authority with respect to the investment of the asset that a prudent investor might delegate in accordance with ordinary business practice;

(b) the attorney must determine the investment objectives; and

(c) the attorney must exercise prudence in selecting a qualified investment specialist, establishing the terms and limits of the authority delegated, acquainting the qualified investment specialist with the investment objectives, and monitoring the performance of the qualified investment specialist to ensure compliance with the terms of the delegation.

Caution regarding American Attorneys

1. FBAR

The main obligation that can be presumptively triggered by virtue of appointing an American as an attorney is an obligation by that individual, in his or her capacity as attorney, to file a *Report of Foreign Bank and Financial Accounts* (an "**FBAR**") with the IRS annually. This is, at its core, a disclosure by the attorney to the IRS of the grantor's accounts that the attorney may control by virtue of the Power of Attorney.

The penalties for failure to file the FBAR can be extreme and can start at $10,000 annually for each account not disclosed.

Note that the FBAR requirements apply to all powers of attorney a grantor makes, including any powers of attorney made with financial institutions, such as on specific accounts. If a grantor has created any of these under which an American is named as attorney, it is often advantageous to cancel those powers of attorney and allow the management of these accounts to be dealt with exclusively by way of the grantor's legally prepared Power of Attorney.

2. Who is an American?

For the purposes of triggering the FBAR requirement, an attorney will attract obligations if the attorney is an American citizen or current green card holder. Depending on the specifics, it can also apply if the attorney has an expired green card, was born in the US, has a parent who was born in the US, or spends too much time in the US.

This risk applies regardless of whether the attorney is also a Canadian citizen or resident.

If the attorney is American and either the attorney or grantor does not wish to contend with such compliance, the Power of Attorney should be replaced with a Power of Attorney that does not appoint the American attorney, or the American attorney should resign.

Resignation and Termination of Powers

1. Resignation of Attorney

If an attorney wishes to resign, the attorney must give written notice of resignation to the grantor and any other attorney named in the Power of Attorney.

If the grantor is incapable of making decisions at the time of the resignation, the resigning attorney must also give written notice of resignation to the grantor's spouse, near relative, or a close friend of the grantor. The Act provides guidance on what is captured as a 'close friend'.

The resignation of the grantor's attorney takes effect when the notice requirements have been met or on a later date if so specified in the notice of resignation.

2. Termination of Power of Attorney

Subject to the terms of the Power of Attorney itself, the authority of the attorney ends if:

(a) the Power of Attorney is terminated or revoked by the grantor, the Court, or a certificate of the director of a Provincial mental health facility or psychiatric unit under the *Mental Health Act*;

(b) the attorneys resigns;

(c) if the attorney was the grantor's spouse, and they cease to be spouses (their marriage or common law relationship ends);

(d) the attorney becomes incapable or dies;

(e) the attorney is bankrupt; or

(f) the attorney is convicted of an offence in which the grantor is the victim.

If you happen to be reading this as a person who may be presented a Power of Attorney for use (such as a bank, credit union, investment advisor, or accountant), be sure to consider whether the person presenting the document to you is someone whose appointment has terminated. Most commonly this arises where someone has ceased to be a spouse.

3. Section 56 of the *Land Title Act*

This section provides that a Power of Attorney expires after 3 years in respect of transactions affecting land, such as sales and mortgages. Most Powers of Attorney expressly exclude the operation of this section. The effect of this is that the Power of Attorney will be effective until otherwise legitimately terminated.

The terms of the *Power of Attorney Act* or the Power of Attorney itself, depending on when the Power of Attorney was created, will usually negate this issue. Should the subject Power of Attorney be made before September 22, 2011, it is imperative that it contain wording excluding the operation of this section. If the subject Power of Attorney does not, it should be reviewed by a lawyer and likely a new one should be prepared.

Liability, Reimbursement, and Compensation

1. Liability of Attorney.

An attorney will not be liable for loss or damage to the grantor's financial affairs, provided that the attorney was acting in the course of the attorney's duties and the attorney complies with the Act and any other legal obligation that may impact the attorney's obligations from time to time.

2. Expenses of Attorney and Compensation.

An attorney is not entitled to compensation for acting as the attorney unless this is expressly stated in the Power of Attorney. An attorney may be reimbursed from the grantor's assets for the attorney's reasonable expenses properly incurred in acting as the attorney.

If, for example, the attorney purchased clothes, medications, or groceries for the grantor, the attorney would be entitled to reimbursement but would not be entitled to payment for the attorney's time and work in purchasing or delivering the clothes or groceries. Any reimbursement must be tracked in accordance with the attorney's record keeping duties.

Conclusion

The foregoing is a general overview of the obligations and powers of the attorney, but each attorney must carefully review the Power of Attorney that authorizes the attorney to act. As an attorney, it is your obligation to comply with all laws governing or affecting you from time to time. The information contained herein should not be treated as legal advice and should not be relied on without first seeking legal advice.

If you would like to learn about creating or using Powers of Attorney, please reach out to one of Harper Grey's Estate Planning Lawyers.

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