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CONTINUING POWER OF ATTORNEY FOR PROPERTY

Definition

A Continuing Power of Attorney for Property is a power that you (the “grantor”) can give to another person (the “attorney”) to conduct your financial affairs on your behalf. You can authorize an attorney to manage your property if you are away from home, or if you find it difficult to look after your own financial affairs. However, most people intend that their Continuing Power of Attorney for Property be used only if they become mentally incapable of managing property.

The law considers you to be incapable of managing property if you are not able to understand information that is relevant to making a decision in the management of your property, or are not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. If you become incapable of managing property without having an attorney who can act on your behalf, a family member can apply to court to be appointed your Guardian of Property, but a court application is expensive and can take several months. Furthermore, a government official called the Public Guardian and Trustee may step in and deal with your assets if no attorney or guardian has been appointed and you are certified to be incapable of managing your property.

Creation and termination

To give a Continuing Power of Attorney for Property, the grantor must be 18 or older, and must satisfy certain tests for capacity. For example, the grantor must know what kind of property he or she owns and its approximate value, and must be aware of obligations owed to his or her dependants. Also, the grantor must know the effect of a Continuing Power of Attorney for Property and the risks associated with it.

The attorney under a Continuing Power of Attorney for Property must also be 18 years old. It is a good idea to have a backup attorney in case your first choice dies or is or become unwilling or unable to act.

A Continuing Power of Attorney for Property can be revoked by the grantor as long as the grantor satisfies the tests for capacity referred to above. A revocation must be in writing and signed by two witnesses. The attorney should be notified immediately that his or her authority has been revoked, or else he or she can continue to act.

A Continuing Power of Attorney for Property will also be automatically terminated in any of the following situations:

- The attorney dies, becomes incapable of managing property, or resigns (unless the Continuing Power of Attorney for Property appoints a joint or substitute attorney).
- The court appoints a Guardian of Property for the grantor.
- The grantor executes a new Continuing Power of Attorney for Property (unless otherwise provided in the Continuing Power of Attorney for Property).
- The grantor dies.

Duties of an attorney

An attorney must not deal with the grantor's property for his or her own benefit, but must act in the best interests of the grantor. In particular, an attorney should:

- Consider the grantor's wishes and goals when making decisions.
- Make reasonable expenditures for the support and care of the grantor and his or her dependants.
- Manage the grantor's property in a manner consistent with personal care decisions being made by or on behalf of the grantor.
- Explain the attorney's decisions and encourage the participation of the grantor.
- Consult supportive family members and friends and foster contact between them and the grantor.
- Obtain a copy of the grantor's Will, if any, and ensure that no property subject to a specific legacy in the Will is disposed of unless absolutely necessary.
- Keep the grantor's money separate from the attorney's own money.
- Keep good records of all receipts, disbursements, and work performed on behalf of the grantor.

Compensation

Under Ontario law, an attorney under a Continuing Power of Attorney for Property is entitled to compensation from your assets in the amount of 3% of capital and income receipts, 3% of capital and income disbursements, and 0.6% of the annual average value of the assets as a care and management fee. Alternatively, you can provide for the compensation to be paid to your attorney in the Continuing Power of Attorney for Property or in a separate agreement. If you select a close family member to act as your attorney, he or she may choose not to charge compensation.

Risks and safeguards

Unless the document provides otherwise, a Continuing Power of Attorney for Property is effective when it is signed, and authorizes the attorney to do anything with the grantor's property that the grantor could do, except make a Will for the grantor. For example, an attorney may open bank accounts, withdraw funds from bank accounts, trade securities, pay bills, cash cheques, and, subject to some statutory limitations, make gifts and loans. Despite an attorney's duty to act on behalf of the grantor, there is a risk that the attorney could misappropriate the grantor's assets.

It is very important that you select an attorney or attorneys whom you trust to take care of you and your assets, and who is willing and able to accept the responsibilities of the position. People often select as their attorney under a Continuing Power of Attorney for Property the same person that they appoint to be the executor of their Will. To reduce the risk that your attorney will misappropriate your assets, you may:

- Appoint two or more attorneys to jointly represent your interests.
- Limit the attorney's power to deal with certain assets.
- Appoint a professional attorney such as a trust company or professional advisor.
- Set up a trust to hold and manage your assets instead of relying solely on your attorney.
- Require your attorney to file annual financial reports with the beneficiaries of your estate.
- Have a trusted third party hold the Continuing Power of Attorney for Property and release it only when you are unable to act on your own.

For more information, please contact Laura Kerr at (613) 614-7140 or lkerr@estateslaw.ca.