

# TAX ALERT



**TAX ALERT** is a commentary on topics of current interest – usually topics relating to recent changes in tax law, new CRA administrative practices or current interpretations arising from tax cases. Professional advice should be obtained before acting on any of this information.

## PLAN YOUR POA FOR PROPERTY CAREFULLY

As financial advisors, we review no end of documents that run to tens of pages. Trusts, wills, corporation charters and the like can very complicated. The power of attorney can be equally complicated but its length is usually very short. The last one I looked at was two and half pages – a very brief document by most standards. So what's the deal?

By the end of this article you will find out that the ever so brief powers of attorney are in fact quite complex and governed not only by the document itself but also by significant statutory legislation and common law rules. You don't see the full legalities in the power of attorney but they are there. The person signing the power of attorney is the *grantor* and the person or persons to whom authority has been given are the *attorneys*.

Whenever I ask clients if they have a power of attorney the answer is usually a short *yes*. It never seems to me that clients have really given enough thought about the vast powers they have given over to others. If they haven't, litigation may only be short way down the line when attorneys and family members get involved in conflict, misunderstandings and differing points of view.

There are two main kinds of powers of attorney in Ontario – the Continuing Power of Attorney for Property and the Power of Attorney for Personal Care. They are primarily regulated by the Substitute Decisions Act (SDA) although other laws may come into play. This article will be restricted to a discussion of the Continuing Power of Attorney for Property (CPA). The Power of Attorney for Personal Care, sometimes known as a living will, will be discussed in a future article.

This article is based on Ontario law, so if you live elsewhere the rules may be different. I have based some of my material on articles presented by Kimberly Whaley (Whaley Estate Litigation, Toronto) at a recent seminar and I thank her for that but I take full responsibility for any ideas contained herein. Obviously, you should seek professional advice in all Power of Attorney matters.

## SOME VERY IMPORTANT SUBSTITUTE DECISIONS ACT PROVISIONS

Some important rules in the SDA that grantors should be aware of before signing are as follows:

- ◆ The attorney can do anything that the grantor can do except make a will
- ◆ Co-attorneys must act together unless otherwise stated in the CPA
- ◆ The CPA usually comes into effect immediately but a time period or an event can be specified

- ◆ The conditions to revoke a CPA are the same as those to make one
- ◆ A CPA is valid if the grantor is capable of giving it even if he or she is incapable of managing property

Once you sign a CPA you should realize that you have put your assets at risk should the attorney be dishonest or even if the attorney is honest but sees things differently than you do. It's not unusual for the attorney to have a different perspective than others in the family or what mom or dad may have once thought – so the attorney must consult as we shall find out. I recently had five siblings in my office discussing dad's CPA – it was nasty.

The SDA specifies that *a person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.*

### **DRAFTING THE CPA**

Responsibility for drafting the CPA starts with a lawyer who should carefully counsel his client before the document is finalized. Some lawyers have checklists which clients must review and sign off on. Most importantly, the lawyer must make sure that grantor is competent and not subject to undue influence by family members or close relatives or friends – even if it is simply their attempt to be helpful. While it may seem draconian, lawyers should usually meet with their clients alone without family present so the conversation can be open and frank.

### **GIVING A POWER OF ATTORNEY - LEGALLY**

In Ontario, the Substitute Decisions Act provides that a person is capable of giving a CPA if he or she knows all of the following

- ◆ The kind of property he or she has and its approximate value
- ◆ Legal obligations to dependants
- ◆ The attorney will be able to do on the persons behalf anything in respect of the property that the person could do if capable except make a will – subject to specific CPA provisions
- ◆ The attorney must account for his dealings with respect to the grantor's property
- ◆ The grantor, if capable, can revoke the power of attorney
- ◆ Unless the attorney manages the property properly its value may decline
- ◆ The possibility that the attorney may misuse the authority given to him or her

An English court case stated more forcefully what a grantor should understand about attorney powers.

- ◆ The attorney acquires complete power over the grantor's affairs
- ◆ The attorney is able to do anything the grantor could have done
- ◆ The attorneys power continues even if the grantor loses capacity

## ATTORNEY RESPONSIBILITIES

Before accepting the responsibilities of attorney, an individual should be prepared to abide by the following responsibilities:

- ◆ Determine if the grantor has a will and understands its provisions in order to retain any property specifically bequeathed in the will
- ◆ Make expenditures reasonable necessary for the grantor or the grantors dependents
- ◆ Beware the rights and duties to make application to the court for direction (if necessary)
- ◆ Beware of the possibility to formally pass accounts if required by the grantor or other family members
- ◆ Keep a list of all assets acquired or disposed of with dates, amounts, reasons and other relevant details
- ◆ Don't disclose information contained in the grantor's accounts except to the grantor
- ◆ Consult with relatives and friends and other attorneys on behalf of the grantor when making decisions
- ◆ Keep accounts and records until authority ceases under the CPA –usually at the death of the grantor

In addition to the rules under the SDA, there are some general rules imposed on the attorney under common law:

- ◆ Use reasonable care in acting
- ◆ Not obtain a secret profit
- ◆ Not allow personal interest to conflict with those of the grantor
- ◆ Standard of care is higher if the attorney is a professional advisor
- ◆ Not assign or delegate the attorney's authority to another person

## DISPUTES

There can be many kinds of disputes under a CPA and Kimberly Whaley lists some of them as follows:

- ◆ The date upon which the power of attorney became effective, the date of incapacity of the grantor and the extent of the attorneys involvement
- ◆ Disputes regarding whether it was the grantor or the attorney who was acting at any given stage
- ◆ The question whether the attorney has made unauthorized, questionable or even speculative investment decisions or decisions lacking in diversity
- ◆ Whether the attorney has taken into consideration the tax affects of an action
- ◆ Whether the attorney has acted in a timely fashion in attending financial matters which may have contributed to unnecessary expenses or damages from inaction
- ◆ Whether the attorney sought professional advice when necessary or appropriate
- ◆ Disputes between siblings regarding the capacity or incapacity of the grantor
- ◆ Attorney misappropriation of assets
- ◆ Disputes where one or more attorneys have acted without knowledge or approval of other under a joint CPA

If someone asks you to be their attorney, do it if you wish, but think carefully about your responsibilities and even whether you have the capabilities to take on the job. You may wish to have a co-attorney so you can test ideas with someone else. At a minimum, you should feel that you can get professional advice from the grantor's lawyer or other professionals.

## COMPENSATION

An attorney is entitled to compensation. If the CPA is silent on compensation, the SDA prescribes a fee of 3% of capital and income receipts, 3% of capital and income disbursements plus 3/5 of 1% of the average annual assets under the attorney's power. The best plan is probably to spell out the compensation in the CPA so everyone knows the grantor's wishes up front and hopefully there should be no fuss. Compensation is taxable, probably as employment income, but CRA is unlikely to allow a deduction for attorney fees paid. Fees are usually considered either to be personal expenses. Best you think about tax implications before structuring attorney compensation – perhaps some other way can be found to accomplish this.

## THE ATTORNEY MUST KEEP AN ACCOUNTING

An attorney is required to keep accounts but is not required to pass them by a court unless ordered to do so. However, an attorney should keep complete accounting records and all related documents, invoices, correspondence and supporting evidence on which decisions were made. Minutes of meetings are not a bad idea either.

## CONSULT, CONSULT, CONSULT

Being an attorney under a CPA is like being the boss on a job without much of a staff to help out. While family and estate beneficiaries can hold you accountable, they may not be particularly helpful to you in making decisions on financial alternatives. That's not to say you shouldn't get their views. But in the end, financial decisions are yours and yours alone to make.

What should you do?

- ◆ Encourage the grantor's participation in decisions.
- ◆ Facilitate contact between the grantor, relatives and friends
- ◆ Consult with relatives, friends and other attorneys on behalf of the grantor

If you are a co-attorney, remember that all decisions must be made together – *unanimous* is the word. Perhaps this doesn't need to be carried to the letter of the law on minor issues but it certainly does on the larger ones. You could be held responsible if either of you stray from this rule.

The attorney should also remember that it is important he or she should know the provisions of the grantor's will –because the attorney will be responsible to estate beneficiaries if they do anything to frustrate a bequest. Recently, beneficiaries of estates are having some success in making attorneys accountable for their actions. For example, if as attorney you sell the cottage that nobody seems to want and the cottage was a bequest to Mary and you didn't check the will to find out – you have a big problem.

## SUMMING UP

The responsibilities of an attorney are many. Because the outcomes of an attorney's many decisions can significantly affect the value of assets and ultimate beneficiaries' entitlements, an attorney should listen carefully to the foot steps down the hall. Accept a power of attorney with great care and expect the worst. But if you make good decisions, know and play by the rules and consult widely, hopefully all will work out. *This Today's Issues was written as an article for the MoneySaver Magazine.*

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