

## COMPLEX POWERS OF ATTORNEY

### **A. Introduction**

Powers of Attorney are useful estate planning documents. There are some cases where the traditional general Power of Attorney is not sufficient for the specialized purpose of the client. In these cases, a more complex Power of Attorney tailored towards the special situation can be of great assistance. Some ideas of what can be done with Powers of Attorney to deal with special client circumstances are outlined below.

### **B. Fees for Services**

Often the maker of a Power of Attorney fully expects that if their attorney is required to act on their behalf, that they will be reimbursed for their efforts. This is not necessarily the case. Courts have traditionally taken the view that fees are not payable for an attorney acting under a Power of Attorney unless the maker clearly provides for the payment of fees in the Power of Attorney. When taking instruction for the drafting of the Power of Attorney the drafter should always canvas this issue with the maker.

If a provision allowing the attorney to take fees for service is not included in the Power of Attorney the attorney is not entitled to take fees. If they wish to be paid for the work done under the Power of Attorney, the attorney is required to make

an application to the Court of Queen's Bench under the *Powers of Attorney Act*. The task then is to convince a judge that it was the intention that fees would be paid for acting and that the attorney merits those fees. The time and legal expense of this process is undesirably self evident.

### **C. Gifts to Beneficiaries**

People often make gifts to family or friends at Christmas or during other special times of the year. When a person becomes incapacitated and no longer able to handle their financial affairs the Power of Attorney will typically come into effect. The gifts will stop there. The law relating to gifts is that an attorney acting under a Power of Attorney does not have the ability to make gifts regardless of the circumstances. The attorney has an obligation to look after the finances of the maker of the Power of Attorney for his or her benefit alone. Unless there is a special provision in the Power of Attorney for the making of gifts and outlining the extent and the nature of those gifts, the attorney cannot make gifts on the maker's behalf. It does not matter that the attorney may feel that the maker of the Power of Attorney wants to make such a gift.

The power to provide gifts under the Power of Attorney is particularly desirable in cases where the maker has disabled dependants. Often in these circumstances the maker is responsible for expenses of the dependant, including monthly rent, groceries, transportation costs, etc. When the maker of the Power of Attorney

loses the capacity to handle their financial affairs, the disabled dependant's continued financial assistance is at risk. Unless the Power of Attorney provides for the gifts, the attorney can't continue to make those gifts on the maker's behalf. The only way to rectify the situation and to provide for the care of the dependant is to bring a support application to the Court of Queen's Bench. With the proper care and attention to the details of the power of attorney in these circumstances, a seamless transition can be orchestrated between the maker and the caregiver of the disabled beneficiaries.

#### **D. Homestead Rights**

A significant change has recently occurred in the law requiring a change to the way lawyers draft Powers of Attorney. Since June 30, 2004, Powers of Attorney for common-law partners have to be executed in compliance with sections 23(2), (3) and 24 of *The Homestead Act*. Formerly, this was necessary only for married persons. In order to effectively deal with homestead rights, Powers of Attorney for married and common-law couples must contain three elements:

1. The Power of Attorney must expressly confer the power to deal with homestead rights.
2. The Power of Attorney must name an attorney or alternate other than the spouse or common-law partner to act where title of the homestead property is to be transferred.

3. The Power of Attorney must attach or embed the prescribed wording of a “Spouse’s Acknowledgement for Power of Attorney” as outlined in the Homestead Act Regulations. This is a required form that ensures the spouse with homestead rights in a homestead has freely relinquished these rights in the legally prescribed manner.

Powers of Attorney that don’t meet these requirements are ineffective in dealing with real property rights of the homestead of common-law partners. A court application is required to remedy this situation if the changes are not properly included in the Power of Attorney before the maker becomes incapacitated.

#### **E. Springing Powers of Attorney**

When a general Power of Attorney is signed, it becomes effective immediately. Some makers are not comfortable with this. There are circumstances where the makers want to maintain complete control over their own financial affairs until it is necessary for someone else to take over. This purpose can be accommodated by provided a Springing Power of Attorney. A Springing Power of Attorney is simply a Power of Attorney that comes into effect on the occurrence of an event outlined within the document or on the say so of somebody appointed in the document. It can be when two doctors have, on examination, declared the maker mentally incompetent. It could be a moment in time clearly specified. It could be when a third party designates that the Power of Attorney is to come into

effect. The event can be anything the maker determines suits their situation best. This type of Power of Attorney can be just what the doctor ordered for someone who wants the security of having a Power of Attorney in place but does not want an active appointment until it is needed.

#### **F. Power to Make an Insurance or RRSP Designation**

Courts have sometimes taken the position that an insurance designation or an RRSP designation is a testamentary instrument. Such a designation is made by an individual under very similar circumstances to that of a person making a will. It is made on the anticipation of death and it is a scheme for the distribution of the individual's assets once he or she has passed away. If this logic were followed through, that would mean that only the individual, the testator making a will, is entitled to make such the testamentary disposition in the form of the insurance designation.

There are two views on this subject. The other side of the argument says that where clearly stated in a Power of Attorney document, that the person appointed as the maker's attorney has the ability to make an insurance or RRSP designation, that the Power of Attorney will give effect to the designation made by the attorney.

There is some controversy around the insurance-RRSP designation concept. If indeed a Power of Attorney is able to change the insurance designation, there is a potential for abuse of that position. What would stop the attorney from designating himself as the beneficiary under the insurance policy? Any beneficiary or interested person can apply to the court under the provisions under the Trustee Act for an accounting and review of the attorneys handling of the maker's affairs. This may or may not present enough of a disincentive for an attorney to engage in improper acts under his attorneyship.

#### **H. Specific Powers of Attorney**

Many people don't realize that there is an ability for Power of Attorney to be created on a temporary basis. Often in the case of the sale of a home where the vendor has to make a trip abroad there is a possibility for making a temporary Power of Attorney to accept any offers that are made during the time of the vendor's absence. There may be many other instances where a Power of Attorney can be useful for an individual or company. It is something that people should consider, especially those who often travel and require that their businesses continue to function under their attorney especially selected and empowered to make effective business decisions in their absence.

## **I. Corporate Powers of Attorney**

There is an opportunity for a business owner to use multiple Powers of Attorney. Individuals who own their own companies may not feel comfortable in appointing their spouses as their attorneys when they know that if they become incapacitated, their spouses will be in a position to run the business. They may solve this problem by appointing a general manager as their attorney so that the business won't suffer during their incapacity. They may not want that attorney to be responsible for their day to day personal financial affairs.

There is an opportunity for dual Powers of Attorney in this situation. One Power of Attorney could be drafted with the spouse as the Power of Attorney with the clearly defined ability to run the day to day personal affairs of the maker. A second Power of Attorney can be drafted to designate a qualified and able individual to run the corporation, in the absence of the maker. There are complexities to this format and each Power of Attorney would have to clearly delineate the areas of responsibility for the attorney. Nevertheless, this can be a very useful tool.

## **J. Information in this Paper not Substitute for Legal Advice**

This paper is intended as an introduction to this topic. It is not a substitute for specific legal advice tailored to a client's particular needs.

Any person wishing advice on how to order their affairs, or those of a client, should contact a member of our Wealth and Succession Practice Group. This paper is also based on the laws of Manitoba, and while laws are similar from Province to Province, the content of this paper may not be accurate in other provinces.

## **K. Conclusion**

Outlined above are a few of the instances where more complex provisions could be included in Powers of Attorney. This is not intended to be a comprehensive list. In the event that a client has some of the characteristics outlined in the individual cases, a full discussion with a qualified estate planning solicitor is suggested. A properly drafted Power of Attorney can prepare an individual for those unique situations that can occur and can provide for a seamless transition between the time the maker is able to run his or her own affairs and the time when help is required.

By: Jacob D. Giesbrecht  
Inkster Christie Hughes  
Wealth and Succession Practice Group  
700-444 St. Mary Ave.  
Winnipeg MB R3C 3T1  
Ph. 947-6801  
Fax. 947-6800

***INKSTER CHRISTIE HUGHES***  
***Wealth and Succession Practice Group***

*Inkster Christie Hughes Wealth and Succession Practice Group assists clients in structuring and restructuring their wealth on an ongoing basis, and in passing wealth from generation to generation.*

*We regularly assist our clients in minimizing income taxes paid and structure special arrangements to improve the lives of the families, friends and community left behind. This involves estate freezes, corporate restructures, living trusts, tax planned wills, special trusts for disabled beneficiaries, estate administration trust administration, and pension fund administration.*

*We serve private individuals, local, national and international corporations, pension funds, trusts, trust companies, banks, planned giving departments and other institutional and non-institutional clients.*