O'SULLIVAN
ESTATE LAWYERS

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Advisory

Multijurisdictional and separate situs powers of attorney for the mobile client

There is a convergence of a number of factors that will cause us to increasingly think much longer and harder about what we need to do to best plan for our incapacity. For instance, greater consideration will need to be given to using powers of attorney that goes beyond a purely domestic approach.

Many of us are familiar with the use of multiple wills if you have assets in different jurisdictions. See our Advisory "Multijurisdictional and Separate Situs Will Planning" for further information. But what about multiple powers of attorney?

We are getting older, living much longer, travelling more, and are increasingly residing in other jurisdictions for protracted periods each year—in particular, in warmer climates.

We increasingly are less domestically focused. We acquire second residences outside our home jurisdiction—whether a ski chalet in the mountains, a golf villa in a sunny clime, or maybe a country house in a rural setting. And if we are not buying a place, we may be renting and spending significant time outside our home jurisdiction.

These trends will likely only increase and, as we become more mobile, incapacity planning needs to be more thoroughly considered to ensure our best interests are served, wherever we may live. Without proper planning, should you become incapable and have assets in other jurisdictions, you and your family could be subject to court proceedings to appoint a guardian or equivalent, which is intrusive, expensive and subject to ongoing court supervision.

INCAPACITY PLANNING USING MULTIPLE SEPARATE SITUS POWERS OF ATTORNEY

(a) Why Use Multiple Separate Situs Powers of Attorney?

At this point in the development of the law, there is a lack of harmonization between many jurisdictions as to what effect a power of attorney prepared in one jurisdiction will have in

O'Sullivan Estate Lawyers LLP
TD Bank Tower, Toronto-Dominion Centre
66 Wellington St. W, Suite 3430, P.O. Box 68
Toronto, ON M5K 1E7

osullivanlaw.com
T 416-363-3336
F 416-363-9570

another jurisdiction, in particular powers of attorney for personal care and advance health directives.

Due to this lack of certainty, and also the time, expense, delay and lack of certainty of success in seeking legal opinions and other processes to try to validate powers in another jurisdiction, a practical approach is to have a local power of attorney for property and for personal care or equivalent instrument in each jurisdiction where you have assets, in particular real estate, or spend significant time. As an example, many have vacations homes in Florida and Arizona. Consideration should be given to having local powers of attorney in each state.

It is important to carefully review your assets and understand your lifestyle and residence patterns. How much time is spent outside your jurisdiction and in which other jurisdictions? Do you have assets, in particular real estate, outside your home jurisdiction? How is title held? Solely in your name, jointly or otherwise? What is your age and general health? Based on these inquiries, an assessment can be made for which jurisdictions powers of attorney in local form should be prepared and where one may not be necessary. For example, it may be possible to change ownership or retitle assets, such as from sole to joint account for certain financial assets, although this should only be done after taking into account all relevant considerations, including the tax consequences of any transfer and the loss of control over the assets.

(b) Planning Considerations in Using Multiple Separate Situs Powers of Attorney

(i) Revocation

It is important in drafting and executing multiple powers of attorney that by inadvertence a pre-existing power of attorney which is meant to be preserved is not revoked, and express provisions need to be included in each power of attorney to ensure this does not happen. This can be accomplished by specifically referring in each power of attorney to other pre-existing ones and expressly confirming they are not to be revoked.

It should be noted that each jurisdiction can have different laws with regard to whether or not a power of attorney, unless otherwise directed, automatically revokes any prior ones or not. For example, in Ontario, subsections 12(1) and 53(1) of the *Substitute Decisions Act* (the "SDA")[1] provide that a new power of attorney will revoke a previous one unless the grantor provides for there to be multiple powers of attorney.

[1] *Substitute Decisions Act, 1992,* S.O. 1992, c. 30.

(ii) Multiple Attorneys

It is important to try to make each separate situs power of attorney as parallel as possible to the principal power of attorney to ensure wherever possible the same set of decision-makers, unless there are particular reasons why this is not advisable. This is not always possible since local legislation varies, and in some jurisdictions it is not possible to have co-appointments of multiple attorneys. In other jurisdictions, it may be possible to do so, but the appointments can only be joint, not several or by majority rule.

(iii) Termination

Local law may vary with regard to termination of a power of attorney. For example, in Ontario, the death of the grantor automatically terminates a continuing power of attorney for property. This may not be the case for financial powers of attorney in other jurisdictions where death may not automatically terminate them. As well, in some jurisdictions, unlike in Ontario, marriage and divorce automatically terminate a power of attorney.

(iv) Compensation of Attorneys

It is important to understand what compensation is permitted, if at all, to attorneys and ensure this issue is properly addressed and integrated with the principal power of attorney, and that there is no possibility of double or over-compensation.

(v) Standard of Care

The standard of care in the local jurisdiction may differ from that under the home jurisdiction's law, or may set a lower standard for family members who act for no compensation and a higher standard for those who act for compensation. To ensure consistency, to the extent it is permissible under each local law, a similar standard should be adopted.

(vi) Execution Requirements

Each jurisdiction will have its own unique formalities for executing powers of attorney. Some are intricate and require a sworn statement by one of the witnesses before a notary or must be witnessed by a notary, or may require initials placed in several parts of the power of attorney to indicate which provisions are to be adopted or not based on several options. It is important to liaise with local counsel to ensure all formalities are properly observed.

(vii) Advance Health Care Directives

It is common in many U.S. states to have very detailed, lengthy health care directives in which you decide on many aspects of your health care. This approach may not be typical in other jurisdictions which allow for such instruments, where they may tend to be more aspirational and generic rather than specific, with regard to medical treatment and end of life care.

USING POWERS OF ATTORNEY IN ANOTHER JURISDICTION

Many jurisdictions now have legislation dealing with powers of attorney for property and for personal care or parallel instruments. Some, but not all, legislation has specific rules with regard to the formal validity of powers of attorney which are connected with another jurisdiction.

(a) Statutory Conflict of Laws Provisions

In Ontario, section 85 of the SDA provides that a continuing power of attorney or a power of attorney for personal care or their revocation is valid with regard to its formality if it complies with the internal law of any of the following:

(i) place of execution;

(ii) domicile of the grantor; or

(iii) habitual residence of the grantor.

As well, all of the Canadian provinces and territories, with the exception of Prince Edward Island and Newfoundland have provisions for the recognition of a foreign power of attorney for property or equivalent. Outside of Canada, both Florida and Arizona have such legislation as well for both types of power of attorney or equivalent, however recognition only applies to instruments executed in another U.S. jurisdiction.

In all of the Canadian provinces and territories, the term "*enduring* power of attorney" is used to describe a financial power of attorney that survives incapacity, with the exception of Ontario which is singular in using the term "*continuing* power of attorney" and Quebec which has three possible instruments: (i) general power of attorney; (ii) mandate in anticipation of incapacity; and (iii) a general power of attorney coupled with mandate in anticipation of incapacity.

Generally, in the Canadian provinces and territories that have statutory recognition provisions, a foreign power of attorney will be recognized if it complies with the law of the place where it is executed. Ontario adds as well compliance with the place where the grantor

was domiciled or had his or her habitual residence, and Quebec adds compliance with the law of the place where the property is situated where the instrument is to be used, or the law of domicile of one of the parties. As well, in Quebec the foreign power of attorney may require homologation by the court upon the occurrence of incapacity before it is effective for use by the attorney. Homologation is a court process whereby the court, based on appropriate evidence, confirms the incapacity of the donor and the existence and validity of the instrument.

It is of interest that the *Hague Protection of Adults Convention*, which is discussed in further detail below, allows for an express choice of law in which any of the law of the donor's nationality, former habitual residence or place where the property is located may be chosen, otherwise it is the law of the donor's habitual residence at the time of execution that governs validity and other formalities in respect of a power of attorney.

Where there are express rules to allow recognition of powers of attorney for property or equivalent where they need to be used, they facilitate use of a power of attorney in those jurisdictions, without the need to rely on traditional non-statutory legal rules, possible court application or other legal process to substantiate validity.

(b) *Hague Protection of Adults Convention* ("Convention XXXV")

Significant progress has been made in Europe to harmonize conflict of laws rules applying to incapable adults through ratification of Convention XXXV. These rules deal with issues involving jurisdiction, applicable law, and recognition and enforcement of court orders involving guardianship or similar protective regimes in other jurisdictions. Convention XXXV also provides rules with regard to formalities and recognition of powers of attorney surviving incapacity which are a form of "powers of representation", the term Convention XXXV employs.

Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Malta, Monaco, Portugal, Scotland and Switzerland have each ratified Convention XXXV. England and Wales amended its mental capacity legislation to incorporate almost identical provisions to those in Convention XXXV. Canada is not a signatory to Convention XXXV, although it has been supported by the Canadian Bar Association.

Under Convention XXXV, an adult person can choose the law to be applied to a power of attorney, including which law governs amendment, termination, validity, and its scope, otherwise the law of one's habitual residence at the time of the grant of authority will apply. Accordingly, it is possible under Convention XXXV to have a power of attorney recognized in a jurisdiction which does not have such instruments.

Convention XXXV can have application to other jurisdictions, even ones that have not signed Convention XXXV. For example, if you have a power of attorney and are habitually resident in another jurisdiction, it would be recognized automatically when your attorney seeks to use it on your behalf if you are incapable in a contracting state. Query however the extent that a power of attorney for personal care or similar instrument would be effective to carry out wishes in a contracting state based on differences in local law and public policy considerations.

(c) Legal Rules Where No Statutory Provisions

(i) Applicable Law

Where a power of attorney is to be used in a jurisdiction which has no provisions in its legislation with regard to the recognition of foreign powers of attorney, or if it does, such provisions do not have sufficient scope to permit recognition, which legal rules apply to determine these issues? The law is somewhat mixed on these issues and often an analysis involving the law of agency is the one utilized on the basis that a power of attorney is a form of agency.

It is fair to say that notwithstanding the ubiquitous use of powers of attorney, including in the commercial context, there is scant literature or case law which deals with the issue of conflict of laws and powers of attorney, and what exists needs to be extracted through review of conflict of laws rules as they apply to agency.

A strictly contractual approach to analysis of a power of attorney which looks to the relationship between principal and agent as a type of contract has been subject to significant legal criticism.

It seems that in many jurisdictions there is still a tendency to either by local law or in practice based on requirements of third parties including financial institutions, title companies and others to sometimes insist on conformity with local law, even as to execution requirements and other formalities, which serve to undermine the purpose of general private law rules allowing for recognition.

Where it is anticipated that a power of attorney may need to be used in another jurisdiction, a precaution is to have a notary witness it and prepare a certificate to such effect which may facilitate recognition in other jurisdictions, in particular civil law jurisdictions. As well, it is preferable to add express powers in the power of attorney so there is more clarity on the attorney's powers than to rely on legislation in the home jurisdiction which may provide for statutory powers.

In attempting to use a power of attorney in another jurisdiction, although it may be formally valid, local law where it is to be used will dictate what substantive effect can be given to it, the rights and obligations of the donor and the attorney, including the scope of the attorney's authority, and any public policy considerations with regard to its use.

As an example, a power of attorney may authorize an attorney to have all the powers of the donor with few exceptions. However, when used in foreign jurisdictions, although it may be recognized as formally valid, local law could have requirements that further circumscribe an attorney's powers to include other acts an attorney may not perform. As an example, there could be more or different restrictions on the making of gifts by the attorney, if they are allowed at all.

CONCLUSION

Incapacity planning is moving to the forefront in estate planning, and with that an understanding of powers of attorney, their importance, and how best to plan them will correspondingly increase in importance as well. This understanding must go beyond domestic borders to encompass any jurisdiction where you decide to spend time periodically or own assets, requiring in many cases multiple powers of attorney given the lack of harmonization of the rules across borders. Careful planning and drafting by experienced professional advisors who understand the importance of ensuring your incapacity planning needs are met is key.

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