[18] *Salter v. Salter Estate*, [2009] W.D.F.L. 3762, 2009 CarswellOnt 3175; see also *Salter v. Salter Estate* (2009), 2009 CarswellOnt 1272, 49 E.T.R. (3d) 139 (Ont. S.C.J.)
[19] Ibid., at paragraph 6
[20] Ibid., at paragraph 6
[21] *Kaptyn Estate, Re* (2009) CarswellOnt 3224
[22] Kaptyn, ibid., at paragraph 13
[23] *Fiacco v. Lombardi*, 2009 WL 2874406 (Ont. S.C.J.), 2009 CarswellOnt 5188
[24] *Substitute Decisions Act*, R.S.O. 1992, c.30 as am.
[25] *Fiacco v. Lombardi*, 2009 WL 2874406 (Ont. S.C.J.), 2009 CarswellOnt 5188, at paragraph 36
[26] *Teffer v. Schaefers*, 2009 WL 1300531 (Ont. S.C.J.), 2009 CarswellOnt 2283 (Ont. S.C.J.) at paragraphs 30, 48, 49
[27] *Ziskos v. Miksche*, 2007 CarswellOnt 7162 at paragraph 184 referred to in the Teffer v. Schaefers decision
[28] *Teffer v. Schaefers*, 2009 WL 1300531 (Ont. S.C.J.), 2009 CarswellOnt 5447 at paragraph 55

The Continuing Power of Attorney For Property

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The Continuing Power of Attorney for Property ("POA") under the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 ("SDA") is an integral component of estate planning. The purpose of this article is to provide an overview of attorney liability, and the limitations and risks related to the use of the POA in corporate succession planning.

Attorney Liability

The potential personal liability of the attorney for financial damages to the grantor during the grantor's lifetime or to the estate of the grantor, and consequently to the beneficiaries of the estate, has been the subject of extensive estate litigation.

The decisions of an attorney are subject to challenge and where there is demonstrable non-compliance with the prescribed duties of the attorney under the SDA, the acting attorney may incur personal liability. Decisions focusing on the nature and extent of attorney liability arising as a result of the exercise of substitute decision-making while a grantor is still capable, highlight the dilemmas which attorneys may face when acting for a capable grantor.

In the 2005 *Fareed v. Wood*[1], the judge held that where a grantor is capable, an attorney who assumes any decision-making functions triggers full responsibility for all actions with respect to the grantor's property, whether the actions were taken by the attorney or the grantor. In Fareed, the court imposed liability on the attorney for transactions undertaken by the grantor without the knowledge of the attorney. The court was critical of the attorney for failing to monitor gifts made by the grantor to third parties under suspicious circumstances.

In contrast, the 2006 decision in *McMullen v. McMullen*[2], while not binding in Ontario, instructs that an attorney may be held liable for losses, including legal fees or other costs associated with actions taken to protect the capable grantor's property, if those actions are taken without the grantor's consent. The court held that even where the attorney is acting in the best interests of the grantor (perhaps where the attorney perceives suspicious circumstances to be the basis of transactions contemplated or undertaken by the grantor vis-a-vis third parties), the attorney must not act without the knowledge and consent of the capable grantor. If the attorney fails to obtain the grantor's consent, he or she breaches the duty to account, the duty to act in accordance with the grantor's intentions and wishes, and the duty to not undermine the grantor's independence.

These decisions should have a chilling effect on the readiness of attorneys to exercise their authority when invited to do so by a capable and willing grantor. If acting while the grantor is still capable, and, depending on the direction in which circumstances develop, before long an attorney may find himself or herself in a "catch-22" situation, ultimately heading towards POA litigation. It may be in the best interest of the attorney to not act while a grantor is legally capable.

Acting As Director

Often a grantor is the sole director of a private corporation. Once incapable, the grantor can no longer perform his or her director functions.[3] It is assumed by some that where there is no co-director, the granting of a POA is sufficient to ensure smooth transition of corporate governance during a time of incapacity of the grantor. This assumption is misguided. The POA grants authority to the attorney to step into the shoes of the grantor with respect to ownership of property and decision making regarding that property. In the corporate context, the attorney steps into the shoes of the grantor as owner of the shares, the property interest of the grantor in the corporation. In that capacity, the attorney has legal ownership of the bundle of rights attached to such shares. The attorney has the authority to sell, transfer, and vote on the shares, on behalf of the grantor.

However, where the grantor is also a director of the corporation, the attorney does not step into those shoes of the grantor. The attorney has no authority to act as director on behalf of the grantor.[4] Only where the grantor is the sole shareholder or, with the consent of other shareholders, can the attorney, in his capacity as shareholder under the POA, elect himself or herself to be a director and act in that capacity.

Tax Considerations

Although this is not settled law, where an attorney steps into the shoes of a grantor as shareholder pursuant to an unconditional POA, the Canada Revenue Agency ("CRA") takes the position that a POA is a right under a contract for purposes of ss. 251(5)(b)[5] and 256(1.4)(a)[6] of the *Income Tax Act* ("ITA") and the attorney is deemed to own all of the shares held by the grantor. In certain circumstances, where the attorney is also a shareholder in other corporations, stepping into the shoes of the grantor in his capacity as shareholder may result in a deemed association of previously unassociated corporations, thus reducing the availability of the small business deduction under the ITA.[7] Where the POA instrument states that the POA is effective only as a result of incapacity of the grantor, neither provision applies prior to the time of incapacity.[8] At time of the grantor's death, the POA is no longer in effect, thus the attorney no longer owns the shares of the now-deceased grantor and the issue of potential deemed association no longer exists.

CONCLUSION

The POA is an indispensable instrument in estate planning. However, if not carefully considered and cautiously implemented, it may give rise to unexpected consequences. Added to the known dangers of fraud and abuse are traps of a more subtle nature, namely, the shortcomings of the POA in the corporate governance and succession context. It is recommended that prior to the granting a POA, particularly where the grantor owns corporate shares, legal advice be obtained.

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[1] (2005), 140 A.C.W.S. (3d) 225, [2005] O.J. No. 2610 (QL) (S.C.J.)
[2] (2006), 27 E.T.R. (3d) 304, 49 R.P.R. (4th) 112, 153 A.C.W.S. (3d) 255 (B.C.S.C.)
[3] Ontario Business Corporations Act ("OBCA"), subsection 118(1)(2) and Canada Business Corporations Act ("CBCA"), s. 105(1)(b).