

February 10, 2025

Duties of Attorneys for Property Part 1

Overview

It is important that the Client preparing new Power of Attorney, known as the “Grantor”, understand the roles and responsibilities of an Attorney for property. A proper understanding of the Attorney’s role will allow the client to select suitable individuals to fulfill this role (and rule out individuals who would not be suitable). Part of avoiding POA conflicts and litigation is to think through the family dynamics of a particular situation or indeed, the lack of family, and to implement safeguards from abuse based on the financial life circumstances of the grantor.

The Power of POAs

A Continuing Power of Attorney for Property (“POA for Property”) is a document put in place during the Grantor’s lifetime. The POA for Property appoints one or more person(s) to look after the Grantor’s financial affairs when the grantor is no longer mentally capable to make decisions for him or herself. The attorney appointed under a POA for Property can do virtually anything on the grantor’s behalf except make a Will. In other words, an Attorney could sell or mortgage the Grantor’s property without the Grantor’s knowledge or consent.

The Fiduciary Relationship

A great deal of POA litigation, particularly amongst siblings could be avoided if Attorneys were properly advised as to their very strict fiduciary duties, obligations and limitations. An Attorney must use reasonable efforts to act in accordance with the wishes or instructions of the incapable person or otherwise act in his or her best interests. To do this, the Attorney must consider the values and beliefs of the individual in question, current wishes, if ascertainable, general standard in quality of life, and whether the benefit of the decision outweighs the risk of harm to the person from alternate decisions.

The Duties of Attorneys for Property

Some of the specific duties and obligations of an Attorney for Property include the following:

- (1) Manage a person's property in a manner consistent with decisions for the person's personal care;
- (2) Explain to the incapable person the Attorney's powers and duties;
- (3) Encourage the incapable person's participation in decisions;
- (4) Consult with the incapable person from time to time as well as family members, friends and other Attorneys;
- (5) Must keep accounts of all transactions involving the Grantor's property.

Potential for POA Abuse

POA documents can often create suspicion, which frequently and inevitably bring the Attorney's actions, motives and conduct into question, whether warranted or not. Some of the types of POA disputes encountered include:

- (a) Whether the Attorney has made unauthorized, or questionable investment decisions or has inappropriately dealt with joint assets and joint accounts;
- (b) Where the Attorney denies the Grantor access/control to his or her finances (such as bank or credit card statements, access to funds);
- (c) Undue influence and pressure from the Attorney to sign documents to transfer or sell real estate, or to give joint access to financial accounts;
- (d) Stealing the Attorney's pension cheques or cash savings.

The Choice of Attorney

Protecting one self against the risks of POA abuse begins at the time a POA document is drafted with a lawyer. Care must be taken to select Attorneys who are trustworthy, who understand their legal duties owed to the Grantor, and who can be counted on to act in a manner which promotes the Grantor's best interests. Individuals who are spendthrift, prone to improper spending habits, affected by drug and alcohol abuse should be avoided. The chosen Attorney should also be capable of working with others such as Co-attorneys and professional advisors.