



Lancaster, Brooks & Welch LLP

BARRISTERS AND SOLICITORS

Business Owner Incapacity

By Michael A. Mann

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If you are a business owner, who will take over your responsibilities concerning the business if you are not physically or mentally capable of doing so? If you know who that person is, have you formalized that intention in a proper estate planning document? A Power of Attorney for Property ("POA for Property") allows you to name a person, or persons, who can manage your assets and debts on your behalf. You may already have a POA for Property but, as a business owner, you should consider whether the person (i.e. the "attorney") whom you have named is the appropriate person to also deal with your business interests.

In a typical POA for Property situation involving a married couple, spouses will name each other as the primary attorney and they will often name an adult child as the alternate attorney. Query, however, whether it makes sense that your spouse (or your son/daughter) would "step into your shoes" relative to your business interests if you became incapacitated? Is it possible that this function would be better served by your business partner or by a manager of your business as one who may be more familiar with the business operations? Keep in mind that your ownership in the business may continue during your incapacity; but during that period of time, the named attorney in your POA for Property – whoever that may be – is obligated to deal with your business assets in your best interest.

A General POA for Property grants authority to the attorney over all of your assets and debts; however, the laws in Ontario permit you to have separate POAs for Property in order to deal with different types of assets. As with the above example, you may name your spouse to make decisions about your house, investments, bank accounts, income taxes and bill payments; but in a separate POA for Property you may wish to designate your business partner or an employee to make decisions for your business. This could apply whether the business operates as a corporation, as a partnership or as a sole proprietorship.

A POA for business assets can also set out express provisions detailing how you would want your attorney to deal with the business and it can provide flexibility to properly empower your attorney while he or she is managing your business interests for you. If you co-own the business, then your named attorney will be able to work together with the other owner(s) to ensure that the business continues to operate in spite of your incapacity.

If you determine that a business POA for Property would be useful to your estate planning needs, you are strongly encouraged to seek professional legal advice to ensure that it is prepared properly.

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