Powers of attorney

Your capacity, care and continuity

When it comes to estate planning, most people are familiar with Wills, which are used to distribute property after death. But it's equally important to address lifetime decision-making, should your mental capacity be diminished by an accident, illness or age-related decline. This complements your Will by taking care of yourself first, before you take care of others.

The naming of substitute decision-makers has been a recommended part of estate planning for decades, though rules vary somewhat among provinces. In this article, we'll outline common principles and planning considerations, using the traditional term "power of attorney" (POA) which is still used in many provinces.

Readers are encouraged to consult an estate planning lawyer in their province to learn the appropriate terminology, and to discuss how the principles in this article apply in their situation.

Legal effect

Powers of attorney allow you to share decision-making power over your property and/or personal affairs with someone else. It is important to note that by doing so, you DO NOT lose your own ability to make those decisions. As the giver of the power, you are known as the grantor, donor or principal.

The person to whom you grant the power is called your attorney. Though that term can be a synonym for lawyer (mostly in American law), in this usage it simply means decision-maker. Other terms include representative, proxy, designate or agent. Whatever the official term, understand that you are giving that person significant legal powers, so your decision to grant a POA and your choice of attorney must be carefully thought through.

A brief history

The law of power of attorney has been around for centuries, with its origins in the judge-made common law. Those early POAs dealt exclusively with property (and related financial matters), and historically would cease to be effective if the person granting the power became mentally incapable of making such decisions him/herself.

Provincial legislation now supersedes most common law rules, including the option for an attorney to continue to act after a grantor's incapacity, in which case it is known as a continuing, enduring or durable power of attorney.

These modern POAs still deal with property decisions, and may also extend to authority over the individual personally. Written authority is required, with some provinces allowing a single document for both purposes, and others requiring a separate document for each role, even if the same attorney is named for both purposes. For distinction in this article, we'll call these the POA-Property and POA-Personal.

Capacity to execute the document

For POA-Property, the grantor must generally be at least age of majority, which is 18 or 19 according to province. As well, the grantor must know the extent and approximate value of his/her property, any legal or moral obligations to dependants, the nature of the power that is being granted, and the potential for its misuse or abuse.

For POA-Personal, some provinces allow the grantor to be as young as 16. Generally, the grantor must understand the kind of decisions covered, which may include medical consent, general health care, nutrition, shelter, clothing, hygiene and safety. In addition, some provinces require an acknowledgement that the grantor believes that the named attorney has a genuine concern for the individual's personal care.

Coming into force

Each province has rules on the format, content and witnessing requirements for the execution of POAs.

It is possible to require that a POA-Property only takes effect once the grantor is incapacitated, but that would require a mental assessment of some sort, which could delay its use when time may be critical. Alternatively, a common practice is to have it effective on execution, with the stated intention on its face that it is expected to be used on a later incapacity. The document should remain in safekeeping, possibly in the lawyer's office vault, which provides a degree of protection against its premature use.

A POA-Personal attorney will normally only act when the grantor is incapable, or otherwise unable to respond.

Scope of authority

A POA-Property attorney can generally do anything that the grantor can do, with the exception of making a Will or doing things that would alter testamentary/estate distributions. For example, the attorney can't change the beneficiary of an RRSP, though some provinces allow continuation of a past designation to a new RRSP or RRIF.

A grantor may place restrictions on an attorney's powers if desired, such as narrowing from all property to some specific property or stating a time limit. Instructions may also be given to an attorney, though this is most often in general terms. Absent that, an attorney's first responsibility is to take care of the interests of the grantor, then any dependants, and possibly provide gifts, loans or donations, so long as it reflects the grantor's habitual practice.

For a POA-Personal attorney, there may be a separate 'living will' or advance care directive stating the grantor's wishes about medical treatment. This may not be legally binding (depending on province), but the attorney must consider any wishes expressed by the grantor while capable, whether in a POA, oral or in writing elsewhere.

Legal duties on incapacity

Acting as an attorney is a big responsibility, especially once a grantor becomes incapacitated. At all times, but especially at this point, an attorney must act diligently and in good faith. The attorney must explain decisions to the grantor and involve the grantor in making those decisions to the extent possible. As well, the attorney should consult with family, friends and caregivers as appropriate, and assist the grantor in maintaining contact with them.

For a POA-Personal attorney, there is a particular requirement to help the grantor live as independently as the person may wish. And when treatment or intervention is needed, it should be the least restrictive course of action.

Who to name as attorney, and how

An attorney must be mentally capable, and generally at least age of majority, though some provinces allow a younger age for a POA-Personal attorney. An attending health care worker or someone providing paid personal care services cannot usually be a POA-Personal attorney, unless it is a family member.

The same person could be attorney under both POAs, as is common with spouses, or separate attorneys could be named for each POA role. There could be a primary attorney, with an alternate if that first-named person cannot serve or continue in the role. Two or more people may be concurrent attorneys for either POA, though it can get logistically and emotionally challenging the more who are involved. If it is intended that multiple attorneys be able to act independently of one another, the POA document must state this as "joint-and-several". Otherwise every decision, instruction and permission, for example signing a cheque, must involve all attorneys "jointly".

In evaluating candidates, a grantor should think about the length and depth of their relationship, as the attorney will be making intimate decisions as if in the grantor's shoes. Knowledge and capability with financial matters are important, as well as practically whether they can devote the time and are physically near enough to do the job. And don't forget organizational and communication skills, diplomacy, confidentiality and general trustworthiness – all of which might be soft skills in other situations, but are at the core of what is needed in this sensitive role.

APPENDIX – Provincial reference material

Below are provincial government websites or resources referenced from those sites. Underlined text in the PDF version of this article are hyperlinks. Full text of the links are on the next page. This is intended as a starting point for resources in each province. Consult an estate planning lawyer in the province for further information.

British Columbia

- Guidance – Advance care planning & My voice: Expressing my wishes for future health care treatment
- Personal – Representation Agreement & Representation agreement, including routine finances
- Property – Enduring power of attorney

Alberta

- Guidance – Alternate personal decision-making options for adults
- Personal – Personal directive information & Personal directive form
- Property – Enduring power of attorney

Saskatchewan

- Guidance – Public Guardian & Trustee – Power of attorney for adults
- Personal & Property – Enduring power of attorney for: Personal – Property – Personal & Property

Manitoba

- Guidance – Public Guardian & Trustee – Powers of attorney
- Personal & Property (guidance only) – A legal information guide for seniors

Ontario

- Guidance – Making a power of attorney & Power of attorney, questions and answers
- Personal & Property – Power of attorney kit

Québec

- Guidance – Incapacity and the need for protection & Advance medical directives
- Personal (guidance only) – What is a mandate?
- Property (guidance only) – Mandate, will, power of attorney

New Brunswick

- Guidance – Managing your financial and personal affairs
- Personal & Property – Powers of attorney [Under review, new law July 1, 2020]

Nova Scotia

- Guidance – Wills and estates: Power of attorney
- Personal – Instructions for creating a personal directive and sample form
- Property (guidance only) – Power of attorney information

Prince Edward Island

- Guidance – Community legal information – Powers of attorney
- Personal – Advance care planning & Health care directive form
- Property – Powers of attorney brochure & Power of attorney kit

Newfoundland and Labrador

- Guidance – Public legal information of NL: Enduring powers of attorney – Advance health care directives
- Personal – Advance health care directive (Legal planning guide for NL, p.12)
- Property – Enduring power of attorney (Legal planning guide for NL, p.7)

APPENDIX – Full text links

British Columbia – https://www2.gov.bc.ca/gov/content/family-social-supports/seniors/health-safety/advance-care-planning • http://www.health.gov.bc.ca/library/publications/year/2013/MyVoice-AdvanceCarePlanningGuide.pdf • https://www2.gov.bc.ca/assets/gov/health/managing-your-health/incapacity-planning/representation_agreement_s9.pdf • https://www2.gov.bc.ca/assets/gov/health/managing-your-health/incapacity-planning/representation_agreement_s7.pdf • https://www2.gov.bc.ca/assets/gov/health/managing-your-health/incapacity-planning/enduring_power_of_attorney.pdf

Alberta – https://www.alberta.ca/making-personal-decisions-for-incapable-adults.aspx • https://www.alberta.ca/personal-directive.aspx - toc-0 • https://cfr.forms.gov.ab.ca/form/OPG5521.pdf • https://www.alberta.ca/enduring-power-of-attorney.aspx

Saskatchewan – https://www.saskatchewan.ca/residents/justice-crime-and-the-law/power-of-attorney-guardianship-and-trusts/powers-of-attorney-for-adults • https://publications.saskatchewan.ca/api/v1/products/9421/formats/14224/download • https://publications.saskatchewan.ca/api/v1/products/9422/formats/14226/download • https://publications.saskatchewan.ca/api/v1/products/9423/formats/14228/download

Manitoba – https://www.gov.mb.ca/publictrustee/services/powers_of_attorney.html • https://www.gov.mb.ca/publictrustee/pdf/legal_guide_seniors.pdf

Ontario – https://www.ontario.ca/page/make-power-attorney •https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/livingwillqa.pdf • https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf

Québec – https://www.curateur.gouv.qc.ca/cura/en/majeur/inaptitude/protection/index.html • https://educaloi.qc.ca/en/capsules/advance-medical-directives/ • https://www.curateur.gouv.qc.ca/cura/en/majeur/client/prevoyant/mandat/index.html • https://www.curateur.gouv.qc.ca/cura/en/majeur/client/prevoyant/mandat/type.html

New Brunswick – http://www.legal-info-legale.nb.ca/en/managing_your_financial_and_personal_affairs • http://www.legal-info-legale.nb.ca/en/uploads/file/pdfs/Powers_of_Attorney_EN.pdf

Nova Scotia – https://www.legalinfo.org/i-have-a-legal-question/wills-and-estates-law/#power-of-attorney-4 • https://novascotia.ca/just/pda/ • https://www.legalinfo.org/index.php?option=com_docman&view=document&alias=238-powers-of-attorney&category_slug=seniors&Itemid=1359

Prince Edward Island – https://legalinfopei.ca/powers-of-attorney/ • https://www.princeedwardisland.ca/en/information/health-pei/advance-care-planning • https://www.princeedwardisland.ca/sites/default/files/publications/health_care_directive_form.pdf • https://legalinfopei.ca/wp-content/uploads/2021/06/CLI-Powers-of-Attorney-English-2.pdf • https://legalinfopei.ca/power-of-attorney-kit/

Newfoundland and Labrador – https://publiclegalinfo.com/wills-estates/#faq_6 • https://publiclegalinfo.com/wills-estates/#faq_7 • https://publiclegalinfo.com/wp-content/uploads/2018/02/PLIAN-Legal-Planning-Guide.pdf • https://publiclegalinfo.com/wp-content/uploads/2018/02/PLIAN-Legal-Planning-Guide.pdf

For more information, please consult your advisor and tax professional.

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