



POWER OF ATTORNEY/MANDATE



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Imagine an aging parent, a person full of independence and capability, falling victim to a debilitating illness such as Alzheimer's disease, or suffering a stroke which impairs his or her mental functions. Consider what would happen if you or a family member are out of the country for an extended period. How will your bills be paid, contracts be signed or cheques cashed? Not uncommon, any of these situations can arise with little or no notice. You may think that in situations of mental or physical incapacity, or simply your absence, that your family can act on your behalf. Unfortunately, that assumption is incorrect. Without receiving court approval or having executed a valid power of attorney (in Quebec referred to as a mandate), your family cannot manage your financial affairs.

Like a Will, a power of attorney is one of the most important documents within your estate plan. Yet, as with a Will, the power of attorney is commonly overlooked until it is too late. This often relatively simple document can save you and your family from financial and other difficulties by authorizing one or more person(s) to act on your behalf should you become unable to do so.

The purpose of this publication is to provide an overview of the power of attorney document. It is recommended that you consult a legal advisor to assist in the preparation of your power of attorney to ensure that it accurately reflects your objectives.

ABOUT THIS PUBLICATION

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Blake, Cassels & Graydon is one of Canada's largest full service law firms with offices in Toronto, Montreal, Ottawa, Calgary, Vancouver and London, England.

It has since been updated by the Financial Advisory Solutions Team of RBC Investments.

2 › WHAT IS A POWER OF ATTORNEY?

A power of attorney is a document in which one person (a donor) authorizes another person (the attorney) to manage the donor's property on behalf of the donor. At its broadest, a general power of attorney authorizes the attorney to do almost anything in respect to the donor's property that the donor himself or herself could do, except make or amend a Will. However, the power of attorney may be more limited. For example, the power of attorney may authorize the attorney to act only during a specified period of time, such as while the donor is out of the country, or only in relation to specific property (e.g. bank accounts) of the donor.

In Quebec, the power of attorney document is called a mandate, the term "mandatary" is used in place of "attorney" and the "mandator" is equivalent to "donor."

In British Columbia, the ability to authorize another person to manage property on the donor's behalf can currently be created through either a continuing power of attorney or a Representation Agreement. The Representation Agreement combines both a power of attorney for management of property and a power of attorney for personal care. However, enduring powers of attorney properly prepared and signed will continue to be valid.

Continuing powers of attorney

A continuing power of attorney (also sometimes called a durable or enduring power of attorney) is one which authorizes the attorney to continue to manage the donor's property during any subsequent incapacity of the donor. The specific provisions included in a continuing power of attorney enable the attorney's authority to continue even if the donor was to become incapacitated.

It is this aspect of the continuing power of attorney which makes it a potentially invaluable planning tool. A donor can ensure that, in the event of a sudden or gradual loss of his or her mental capacity, a trusted individual will be able to manage his or her property for the benefit of the donor and any dependents. In Quebec this is called a mandate in anticipation of possible incapacity.

Stock powers of attorney

One of the most common forms of limited power of attorney encountered by investors is the "stock power of attorney." This is a brief document which authorizes the transfer of shares of a specific company from the owner to another person, usually a purchaser of the shares. Where shares are held in certificate form (i.e. in the owner's name), it is necessary to either endorse the back of the certificate on transfer of the shares, or to execute a stock power of attorney. Stock powers of attorney are also usually required on the sale of securities held in the name of a deceased individual as part of the documentation necessary in the administration of the estate.

Personal care powers of attorney

It should also be noted that in many provinces there is legislation that permits an individual to name a person or persons to make decisions concerning personal or medical care or treatment if (and usually only if) the individual is incapable of making his or her own decisions of this nature. While the document making this type of appointment may also be called a power of attorney, it is quite distinct from the powers of attorney which deal with property described earlier.

The donor may choose to appoint different individuals to make these types of decisions than those he or she names to manage property. These documents may contain very personal wishes concerning the type of care or treatment the individual does or does not wish to receive. Directions concerning the nature and extent of medical treatment, or the termination of such treatment in the event of terminal, serious or chronic illness or a disabling accident (often referred to as "living Wills" or "advance directives"), may be incorporated into a power of attorney governing personal care, or may exist as independent documents with their effect and specific terms varying according to the relevant provincial law.

The provinces of Alberta, Manitoba, Ontario, Quebec, New Brunswick, Newfoundland and Labrador, and Nova Scotia, all have legislation allowing for the creation of a personal

care power of attorney. Depending on the province, documents which provide authority similar in some respects to a personal care power of attorney may be referred to as: a living Will; a mandate; a health care directive or proxy; or an advance directive.

In some provinces, such as New Brunswick and British Columbia, it is possible to combine a power of attorney for property management with a personal power of attorney for personal care. In British Columbia, this document is called a Representation Agreement. In the province of Quebec, a mandate prepared by a notary will be registered with a centralized registration system to ensure that all mandates may be easily traced.



3 › WHO CAN MAKE A POWER OF ATTORNEY FOR MANAGEMENT OF PROPERTY?

In general, anyone reaching the age of majority who understands the nature and the value of his or her assets, as well as the nature and effect of executing a power of attorney, may appoint another person to look after his or her financial affairs. Depending on the province, a person reaching the age of 16 may make a power of attorney for personal care.



4 › WHY SHOULD YOU HAVE A POWER OF ATTORNEY FOR MANAGEMENT OF PROPERTY?

Absence

If you travel frequently or are away from your home for extended periods of time, a power of attorney can provide an extra measure of comfort in knowing that if anything comes up which requires immediate attention, someone is able to act on your behalf. You may know that a real estate transaction is to close or a takeover bid must be responded to in your absence. Your attorney can act as instructed by you to take care of anticipated business matters. While many decisions can be handled through telephone directions from your destination and documents can be sent by couriers or facsimile, there are situations where these options are inconvenient or unavailable. Having an authorized attorney to act on your behalf in such circumstances can be beneficial. Knowing that there is someone able to deal with anything that arises unexpectedly in your absence can add to your peace of mind.

Incapacity

For most people, the main reason for having a continuing power of attorney is to provide for the possibility of loss of mental capacity. This can arise due to a sudden illness such as a stroke, an automobile or other accident, or an age-related illness resulting in the gradual loss of mental faculties.

While a gradual decline of capacity is of more concern to older persons, sudden illness or accident can be experienced by anyone, regardless of age. If you do not have a named attorney to act with respect to financial matters, it may be necessary to apply to the court for the appointment of someone to attend to your financial affairs. The person appointed may not be the one you would like to have act on your behalf, and the terms of the appointment may not be consistent with the way you would want your property managed. A court application is usually costly and takes weeks or even months to conclude. The appointee may be required to post security, often in the form of a bond from an insurance company at your expense. Government officials, such as the Public Trustee, may be involved in the court application, resulting in more expense and



complexity. There may be requirements to report on an ongoing basis to government officials and/or the court, also at your expense.

A continuing (enduring) power of attorney will probably avoid some or all of these proceedings. In addition, a continuing power of attorney gives you the opportunity to select those whom you wish to manage your property, and even to give some guidance as to how this is to be done.

5 › CHOOSING AN ATTORNEY

Must my attorney be a lawyer/notary?

One frequent misconception when selecting an attorney is that this person must be a lawyer/notary. This is not the case. Your attorney can be any mentally competent adult or a trust company. Your attorney has a fiduciary duty to act in your best interest and is accountable to you and the beneficiaries of your estate.

Should my spouse be my attorney?

Your spouse may be the appropriate choice as your primary attorney. Since your spouse is often away at the same time you are, and since there is a risk of being together in an incapacitating accident, naming someone else to act as alternate for or in addition to your spouse is advisable. In some cases, you may wish to have your spouse act together with another individual who may be younger or may possess better property-management skills.

Who else should I consider naming as an attorney?

Adult children are often named as attorneys, either as co-attorneys or as alternates. Preferences may be given to those children living close to you and who are not required to travel extensively. Lawyers, notaries, accountants, trust companies, relatives and family friends may also be chosen. You should carefully consider the nature of your assets and the type of management they require, and then select persons you consider to be capable of handling your affairs personally. These persons must also know when and how to seek professional assistance as required. If you decide that a trust company is an appropriate choice, it is necessary to speak with a trust company representative as it may have internal rules which must be complied with if it is to accept the appointment.

Should my attorneys act jointly or jointly and severally?

If you name two or more individuals as your attorneys—either as the first choice or as alternates to a single individual such as your spouse—you must decide whether they should be required to act together in all cases (that is jointly), or whether they may act together and separately (that is, jointly and severally).

If two individuals must act together, you may feel less concern that your property will be mismanaged or even misappropriated. In this situation, you run the risk that

deadlock may occur, or that there may be delays in communication or action as a result of the practicality of getting two or more people together. However, it may well be that the increased security of requiring joint action outweighs any concern about delay or inconvenience. If you name more than two attorneys to act jointly, you should consider a majority-rule provision to facilitate the efficient management of your affairs.

If you decide to name two or more attorneys who can act jointly and severally, it is much simpler for them to divide up the tasks of management to suit their circumstances. For example, if you name a spouse and a child, the spouse might take care of routine bill payments and the child attend to investment matters. If you name all of your children, no one will be left out of the decision-making process, but each can participate to an extent mutually agreed upon. If more than two people are named, even if jointly and severally, it may still be advisable to include a majority-rule provision to provide a means of resolving disagreements.

6 › WHAT SHOULD MY POWER OF ATTORNEY SAY?

In addition to the naming of your attorneys and any alternates, as well as providing that it will survive mental incapacity, your power of attorney may include specific directions as to various aspects of property management that you consider important. These additional provisions will vary somewhat from province to province, depending upon the provisions of the relevant provincial legislation.

Some examples of additional provisions you may wish to consider are:

- › a wish that your attorney be permitted to act without posting any security regardless of where the attorney may reside;
- › a direction concerning the manner in which dependents are to be provided for, particularly if a dependent is also an attorney and might otherwise have a conflict-of-interest problem;
- › a provision to maintain any assistance provided to persons who are not dependents, such as education expenses for grandchildren;
- › a direction to continue with gifts to family, friends and charities in a manner similar to your usual pattern of giving;
- › a power to make loans to children and their families, probably keeping the various family groups on an equal footing. This may be conditional on your incapacity and where there are funds surplus to your needs and the needs of your spouse;
- › any special provisions you consider appropriate concerning retention and use of a family cottage, cabin, ski chalet or other seasonal residence;
- › any special directions concerning compensation to be paid to your attorneys for acting as such;
- › a power to delegate some or all of the attorney's powers and duties to agents and to appoint substitute attorneys, if necessary;
- › any restriction or limitation on the power exercisable by your attorney such as prohibiting your attorney from selling or otherwise transferring any of your property to his or her name;
- › a provision stating the circumstances in which the power of attorney may be exercised or revoked;
- › the name of a doctor who you wish to determine your capacity, or if your solicitor is safekeeping your power of attorney, the circumstances under which the solicitor may release the power of attorney.

This list is not exhaustive and many of these items may be unnecessary in your particular situation. What is important is to think about your own situation and consider the things that would be important to you to have handled in a particular manner. Then you can discuss with your legal advisor the best way to provide for them. In some cases a memorandum from you to your attorneys may be sufficient to ensure your wishes are known and honoured.

By executing a new continuing power of attorney for property or a power of attorney for personal care, the grantor automatically revokes a prior power of attorney unless the new document provides that there are to be multiple powers of attorney in co-existence. Care must therefore be taken to ensure that the grantor does not inadvertently revoke a power of attorney authority previously given for a specified purpose that the grantor wishes to be continued along with the new general authority being given.

7 › WHAT WILL A POWER OF ATTORNEY COST?

There is no simple answer to this question. Cost will vary depending on where you live and how much time and attention is required to complete your power of attorney. When you consider the problems and costs that may be incurred should you lose capacity and have no power of attorney, it is apparent that this document is very valuable to you. If you are well prepared and able to give clear instructions, the costs will be minimized without compromising the quality of your power of attorney. It is also likely to be less expensive, if prepared in conjunction with a Will or other estate planning documents.



8 › CONTINUING POWER OF ATTORNEY AND JOINT ACCOUNTS

It is common knowledge that an individual that is an attorney on a continuing power of attorney does not have the power to change the Will of a person that is incapacitated. However, in the area of estate planning by an attorney, in such areas as transferring assets to a joint account to avoid probate taxes and U.S. Estate Tax planning, there has been reluctance on the part of the courts to allow an attorney to make such estate planning changes.

The refusal to allow these changes are based mainly on the issue that these changes are not made to benefit the incapacitated person, but rather to benefit the future beneficiaries.

Hence, prior to an attorney making any estate planning changes when the person is incapacitated, the attorney would be wise to seek independent legal advice.

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