

Inside Powers of Attorney

You probably need one or more powers of attorney, but first you need to understand them

Adapted from:

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The statistics show that on average, we're living longer than ever before. That's wonderful news, but one unfortunate consequence is an ever-increasing likelihood that we may become mentally incapacitated at some point during those many more years to come. If that happens and we're not prepared, the result could be inconvenience and delays at a very trying time, and likely some costly financial or health-related problems.

Consider what might happen if you lost the ability to control your own purse strings—how would you get pocket money, pay your bills, take care of your savings? You'd no longer be able to do these chores, but no one else could either, not without your legitimate authorization in the form of what's commonly called a power of attorney (POA).

"Some institutions won't even talk to family members unless they have powers of attorney," says Melanie McDonald, the vice-president and regional director of trust and estate services at BMO Trust in Calgary. "If there's no POA, it's a challenging situation. A family member must go to court and apply to be appointed, and that can cost thousands of dollars. And all the assets are frozen until someone is approved. It can all be very stressful, and any health problems can be compounded as a result."

"There are some differences between the provinces, but mainly in nuance and in language changes," says Leanne Kaufman, the president and CEO of RBC Royal Trust in Toronto. "But generally, if there's no power of attorney, then someone must apply to the courts to be appointed as 'attorney' or 'guardian' or 'committee' [pronounced *commi*TAY in this usage]." If no family member is able to act as attorney and no close friend or other relative steps forward, the province will take up the reins (matters of estate fall under provincial jurisdiction), and we all instinctively understand what that means.

"In general, no one has natural standing to step in and take control of someone else's finances," Kaufman says. "It can be done only if you apply to the courts. In some situations, the government may step in, but that may not be desirable for the individuals involved or for governments that have limited resources."

Indeed, Ontario's Ministry of the Attorney General, for example, notes on its website that family members "may be sought" or "someone else—such as a close friend—could apply," but "the Office of the Public Guardian and Trustee (OPGT) acts only in situations where it is legally required and where no other suitable person is available, able, and willing."

Kaufman adds that while the rules in most provinces are indeed similar, Quebec is an outlier. “They have an entirely different legal system [based on civil rather than common law] and they have no enduring power of attorney—you have to apply to the courts for it. It can be the same document [as an existing POA], but it still needs to be homologated [approved] by the courts.”

Definitions

So what exactly is a POA (called a representative agreement in British Columbia and a mandate in Quebec)? And how do you go about creating one?

Essentially, a POA is a document you have signed (and had witnessed) giving one or more people the authority to manage your money and property. The appointee doesn't need to be an actual lawyer and you don't require a lawyer's help in creating the document, although it's generally recommended. And of course, you must be mentally competent at the time you sign it.

A general, ordinary, or non-continuing POA has effect only while you are mentally capable of managing your own affairs. You might use this if, for example, you need someone to look after your affairs while you're away for an extended period. Generally, any of these POA types can be revoked at any time.

An enduring or continuing POA, on the other hand, remains in effect despite incapacity. It can take effect as soon as it's signed or (depending on provincial rules) it may be triggered by some specified future event (such as your being declared *non compos mentis*). An enduring POA may be revoked only with great difficulty and cost (if at all) once that declaration has been made. That's why it's important to get it right the first time—there may not be a second chance.

As for the extent of the power itself, this must be defined in the document. The appointee could do almost everything on your behalf that you could do: banking, signing cheques, buying or selling real estate, buying consumer goods.... A POA does not, however, bestow ownership rights, and an attorney cannot create or alter a will on your behalf, change a beneficiary on a life insurance plan, or grant POA to someone else on your behalf.

Documentation

The POA document itself can be a single page or span multiple pages, depending on the complexity of your affairs and the extent of your instructions: it could consist of a simple one-paragraph blanket endorsement or sheaves of detailed financial data and instructions. Beyond this, a POA document requires only a few key elements to be legally valid:

- your identification (including address, phone number, etc.)
- identification of the attorney or attorneys
- your signature and the date
- the signature of the witness or witnesses

Thus the form itself can be fairly simple in execution. The laws don't require you to use a lawyer's services and there are many cheap or free forms online, on both government and private websites, though you should probably favour the former where possible. "There are lots of online documents," McDonald says. "Those provided on government websites will be legal and valid, but I can't speak for the others."

"Yes, you can get the forms off the Internet, and Ontario, for example, provides them, as do some other provinces," Kaufman says. "They can meet your basic needs, but they won't take into account any personalized wishes."

And of course, the inevitable devils lurk in the detailing of those wishes. An article about the POA on the Employment and Social Development Canada (ESDC) website likens the process to a balancing act: "...Inadequate information or limitations in the document could lead to mismanagement of funds or their being managed in a way that you do not agree with. But overly strict limitations can make it difficult for your attorney to take care of your finances."

Les Kotzer, a wills lawyer with Fish & Associates in Thornhill, ON, adds that in some cases, there can be further problems. "If you list the assets you want looked after in the POA and you forget to mention one, or your assets change, then anything not covered can't be touched by the attorney," he cautions. "To avoid this, you should create an all-encompassing POA."

Similarly, Kotzer points out that if you create a POA with a triggering clause stipulating that it comes into effect if you're declared mentally incompetent, but you're stricken by a debilitating physical condition such as ALS [amyotrophic lateral sclerosis] or Parkinson's disease, you may need help with your banking, but the POA won't be triggered. If mental incompetence is required, you've put a roadblock into the POA," he says. "Your attorneys can't act for you. The solution is to make the POA effective immediately."

Then there's the process itself, which also can vary by province, according to an article entitled "Introduction to Powers of Attorney in Canada" in duhaime.org's online legal encyclopedia:

- "Some provinces require two witnesses before a power of attorney can be valid; other provinces require that the power of attorney be registered in the courthouse.
- "Some provinces exclude certain persons from acting as attorney to a power of attorney, while others require special government forms to be used.
- "Some provinces do not recognize the 'springing power of attorney' [arising from a triggering event such as an incapacity ruling]."

Given all of this, while you're not obliged to hire a lawyer to create a POA, there are many good reasons for doing so, at the very least to review what you have created.

"You can do it yourself legally as long as you follow the rules," Kaufman says, "but I wouldn't advise trying it on your own. Lawyers can provide invaluable advice about certain options and

choices that are not clear on the forms. And they can give consideration to how the POA works in the context of your overall estate plan.”

“A lawyer can give you advice and options you hadn’t thought about before,” McDonald observes. “And bear in mind that if you make a mistake, you [that is, your would-be attorney] may still have to go to court.”

The duhaime.org encyclopedia article, for its part, stresses the critical importance of ensuring that all the wording is legally clear; the final advice from that source is to “have your draft of the power of attorney reviewed by a lawyer before signing it!”

“People with recreation or second properties outside their home province, or who are moving away, may need a POA for that other jurisdiction, as well,” McDonald adds. “Wills are generally common to all provinces, but a POA is specific to each, so if you move or will need to use it in another province, territory, or country, get legal advice to be sure the document will be recognized. It may be necessary for you to make a new document for certain assets.”

ESDC also advises that you review the terms of your POA regularly to make sure it is still valid and still reflects how you want your money and property managed. If you make any changes, you should advise all concerned.

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