

A Common Sense Approach to Powers of Attorney for Property*

Today people live longer than before. It is estimated that the number of Canadians over age 65 is close to five million and the number of centenarians at almost six thousand – the highest ever. Whether you are part of this group or not, estate planning is a critical component of good financial planning.

Estate planning includes dealing with what happens if you are alive but unable to take care of your financial assets as well as looking after what happens when you die. In the first instance documents called Powers of Attorney for Property are essential. Understanding what these documents are and why they are essential is an important step in the estate planning process.

What is a Power of Attorney for Property?

A power of attorney for property is a legal document authorizing one or more individuals, an institution such as a trust company, or a combination of the two to act on your behalf to manage your property. The person named in the document is called the “attorney” and the person giving the power is called the “donor” or “grantor”. The document allows the attorney to take care of your financial assets. He or she can take money out of your account for you, pay your bills, deal with investment decisions, continue any planned giving arrangements you have in place, manage rental properties and generally look after your financial assets.

Powers of attorney can be unlimited, giving the attorney the broad right to manage your property, or restricted, where the attorney can only act for a specified time or for a specific event. An example of a restricted power of attorney is one given to an individual where the power is restricted to a particular transaction or asset. An example of an unrestricted power is one given to an individual authorizing them to look after your affairs, including in the event that you become incapacitated. Generally unlimited powers of attorney should also be continuing or enduring, meaning it stays in effect if the donor becomes incapacitated. All provinces other than Quebec allow this document. A power of attorney can also be springing, meaning it only becomes effective on the donor’s incapacity.

Who should be my Attorney?

Understanding the responsibilities of an attorney will facilitate making the choice of who to appoint. Although the power of attorney is often used as a tool of convenience or for a specific purpose, the person named as the attorney may ultimately be responsible for managing all of your assets if you are unable to look after your affairs yourself. Depending on the wording of the power of attorney, the attorney may also have the ability to deal with your affairs from the day you sign the document. Accordingly, this person should be very trustworthy and experienced in financial matters.

Generally the responsibilities of an Attorney include this:

- ▶ Keeping an account of all transactions concerning your property under management; this property should only be used for your benefit or in your best interests.
- ▶ Taking care of your expenses and the financial obligations of any legal dependents. The attorney should manage your property keeping in mind the terms of your will. If your will includes a gift of specific property, the attorney should do his or her best to retain this property unless it is needed for your wellbeing and benefit during your life.
- ▶ Managing your financial assets including investments, real estate, bank accounts and other financial assets. The attorney ought to be in close contact with the person you appoint to make decisions regarding your personal care if you cannot make these decisions yourself. Your agent for personal care will need to understand how much to spend on your living expenses and would have to work with your attorney to determine the budget. If it is in your best interest to have around the clock care this must be explored even if it means minimizing the value of the estate you leave behind.

What happens if there is no Power of Attorney for Property?

In most provinces in Canada adult persons are presumed capable of managing their affairs, unless it is proven that they are not. If you become mentally incompetent and you do not have a power of attorney for property, in most cases an application must be made to the court to have someone appointed to make legal and financial decisions on your behalf. If no one applies to be appointed, the Public Guardian in your province may assume that responsibility. In the court appointment process a lack of capacity must be proven. This can be emotionally difficult, especially if you oppose the application. Generally, the cost of making such an application is significantly greater than the cost of drafting a Power of Attorney for Property ahead of time. The courts may grant to any person the power to make legal and financial decisions for you. This means that the appointed person may not be the person that you would have wanted to appoint to make these decisions for you.

Mrs. Smithson's story

Consider the case of Mrs. Smithson, who was 92 years old and lived in her own home with the aid of a caregiver, Harriet, for many years. Her family was busy and, although loving, did not live close by. They were sure that she was being well taken care of by Harriet. Harriet had been appointed her attorney many years ago when Mrs. Smithson first needed assistance in taking care of her finances. Over the years she carried on with

Mrs. Smithson's help and direction. Now that Mrs. Smithson was incapable she could no longer oversee and approve Harriet's actions. Over time, funds went missing.

Harriet was not as prudent as she should have been and dipped into Mrs. Smithson's funds for personal reasons. Mrs. Smithson's family eventually stepped in and took over management of Mrs. Smithson's assets. To do so, they had to hire a lawyer and apply to court to have Harriet removed as attorney. Had Mrs. Smithson named one of her children to act as attorney with Harriet, Mrs. Smithson's assets may have been better protected.

Ben's story

Consider the case of James and his father, Ben. James was Ben's only son and the sole beneficiary under his will. Recently Ben added James on title to his condominium as a joint tenant with the right of survivorship. Shortly thereafter, Ben suffered a stroke and was deemed incapable. James moved Ben into a nursing home and listed the condo for sale, thinking that as joint owner and sole beneficiary of his father's estate he could take care of everything. In fact because Ben was still alive someone had to sign off on the sale on his behalf. James could not do so because Ben did not have Power of Attorney for Property in place. James had to hire a lawyer to make an application to the court for him to be appointed as Guardian for Ben. As part of the court application, Ben had to go through a capacity assessment before a doctor. It also meant that the sale of the condo was delayed for several months. This was extremely stressful for both Ben and James and was costly, both in terms of time and money.

Final Words

Powers of attorney are essential and powerful documents. They are needed to ensure that your finances are managed if you do not have the mental capacity to do so yourself. They place all of your assets under the control of someone at a time when you are vulnerable. When considering who to name as an attorney consider his or her character, your needs and your intuition about his or her personality and character. If you are unable to find an appropriate person to act as your attorney for property, you should consider a professional trustee, such as National Bank Trust. Although perceived as impersonal and objective, a professional trustee is fair and is subject to such strict scrutiny you can be sure that your property will be well managed. Although finding the appropriate attorney may not be easy, it is far better to appoint someone you deem to be trustworthy and competent rather than letting another person apply to the court to manage your assets without your consent.



* Referred to as an Enduring Power of Attorney in Alberta, British Columbia, Manitoba, Saskatchewan, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, and Yukon; a Continuing Power of Attorney in Ontario; a Power of Attorney During Legal Incapacity in Prince Edward Island; and a Protection Mandate in Quebec.

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