

WOOD GUNDY

GIVING SOMEONE THE POWER TO ACT ON YOUR BEHALF

A power of attorney is a legal document which authorizes another person to act on your behalf. In this context, the term “attorney” does not necessarily mean “lawyer”. You can choose any mentally capable person to act as your attorney, subject to age restrictions that apply in some provinces. It can be a spouse, relative, friend, lawyer, accountant or other trusted individual. You also have the option of appointing a trust company.

It is important to distinguish between a power of attorney and a Will. A power of attorney may only be used during your lifetime, and terminates on death. A Will, in contrast, deals with disposition of your property and only takes effect after death.

Giving power of attorney to someone does not take away your power to act on your own behalf. It does, however, authorize your attorney to share that power. Even if there is doubt as to your ability to deal with your own affairs, the primary legal method of resolving that doubt is a finding or assessment of mental incapacity by a court or through other legal process.

A power of attorney can be revoked or terminated at any time provided you are not mentally incapable. In general, you may be considered mentally incapable if you are unable to understand information relevant to making decisions or cannot appreciate the reasonably foreseeable consequences of decisions. It is important to note, however, that even if you are not mentally capable of making decisions about the ongoing management of your property, you may still be capable of giving a power of attorney to someone else.

Choosing your attorney

It is critical that you give careful consideration to the person who will have access to your assets and control over your financial well-being. Your attorney should be someone you completely trust to act in your best interests. You can have more than one attorney, but if you do, you should stipulate whether they must act together, by majority or individually. It is beneficial if the person appointed to handle your property is versed in financial matters, or is astute and will seek professional help if it is required. It is important that you consult with those you wish to appoint, and make sure that they are able and willing to act on your behalf now and in the future. Depending on applicable provincial law, your attorney may not be entitled to compensation unless you specifically indicate otherwise.

Are there risks in giving someone power of attorney?

There is always a possibility that an attorney could misuse his or her authority or mismanage your assets. You should always ensure that any original or notarial copies of your power of attorney are safely and securely stored, and carefully keep a record of who holds a copy. If you decide to cancel or revoke a power of attorney at a later date, you should seek legal advice. You should also notify any person or institution that your attorney may have dealt with on your behalf, and retrieve and destroy all copies of the power of attorney documentation, if possible.

A general power of attorney

Regardless of age or health, many people are concerned about the possible need for a general power of attorney which would give another person broad power to act on their behalf if they become incapable of acting on their own. Individuals in their retirement years may be particularly motivated to consider this.

Subject to applicable provincial legislation and to any restrictions that you may place on your attorney, a general power of attorney or equivalent can be all-encompassing and grant authority to make virtually any type of decision relating to your property that you could make yourself, except to make a Will. Generally, you can indicate that the power should be continuing or durable, meaning it can still be used if you become mentally incapable. If you do not have a continuing power of attorney and you become mentally incapable, your family or friends may have to go through a time-consuming and expensive legal process to get authority to manage your financial affairs.

Depending on applicable provincial legislation, a power of attorney can be structured to come into effect only if a specific event occurs (for example, if you are assessed as being mentally incapable) or it can be structured to come into effect immediately. Because of the difficulties that may arise in establishing to third parties that a person is incapable and that a power of attorney has become effective, a general power of attorney or equivalent is usually prepared to have immediate effect and contains a continuing or enduring clause so it will remain effective.

However, there should be safeguards to minimize any risk of the power of attorney being abused. For instance, original executed copies of the power of attorney may be left with a trusted third party, such as your lawyer, with a direction as to when they may be released. You can then inform your attorney that before any copies of the power of attorney will be released, he or she must meet the conditions contained in the direction.

A limited power of attorney

Specific occasions may arise when you need to have someone else act as your legal representative. For instance, if you are buying or selling real estate and you expect to be unavailable on important signing dates, you can give another person a limited power of attorney with clear instructions as to its use. A limited power of attorney may also apply to specific acts on an ongoing basis, such as negotiating securities transactions in one or more investment accounts. Generally, a limited power of attorney does not provide that the power should continue if mental incapacity occurs. In fact, you are cautioned that if a limited power of attorney does indicate that it should continue if mental incapacity occurs, it may revoke any previously executed power of attorney that is continuing.

A power of attorney for personal care

Every province has its own laws and regulations relating to powers of attorney for financial matters, and several provinces now have legislation allowing you to appoint an agent or attorney to make personal care decisions as well. Unlike a power of attorney for property, a power of attorney for personal care generally comes into effect only upon mental incapacity. A power of attorney for personal care may govern such matters as medical treatment, health care, nutrition, shelter, clothing, hygiene and safety. The person named in your power of attorney for personal care does not have to be the same person named in your power of attorney for property, however, you can designate the same person if you wish.

A power of attorney for personal care may include instructions normally dealt with in a Living Will (also known as an advance medical care directive or health care directive). A power of attorney for personal care can convey to your attorney, as well as family, friends and doctors, your personal philosophy and views regarding health care and your wishes regarding life-prolonging treatments in the face of terminal illness. Living wills create legally binding instructions in some provinces, and their primary purpose is to give direction to family and caregivers about your wishes. A power of attorney for personal care should be reviewed periodically and revised as your personal circumstances change with time.

The “do it yourself” power of attorney

A power of attorney is a powerful grant of authority. While the actual preparation of the document may be relatively straightforward, applicable legislation will often contain prescribed rules and procedures. For example, if a power of attorney is not properly signed and witnessed, it will be invalid. In addition, the decisions that an attorney will have to make and the responsibilities that accompany them are often complex. Important consequences will flow from choices about whom to

appoint as an attorney, what the safe-keeping arrangements and procedures for release will be, and what powers should be given or excluded. (For example, should the power to alter beneficiary designations on registered plans and insurance policies be specifically excluded?) Unless a power of attorney is properly prepared and clearly sets out your intentions, your wishes may not be fulfilled if mental incapacity should occur. For all of these reasons, it is recommended that legal advice be obtained to ensure that your wishes and objectives are achieved.

Alternatives in planning for incapacity

Joint accounts (rules differ in the Province of Quebec)

Holding bank accounts and investment accounts in a joint name with your spouse (or other trusted family member) may decrease the need to have a power of attorney, provided the accounts are set up so that either of you can sign or make transactions. However, this does not mean that a general power of attorney for property is not necessary. If you have other individually-held or jointly-held assets (such as real estate) you will still need to consider giving each other power of attorney to allow transactions to take place if one of you becomes mentally incapable. In addition, there may be other unanticipated situations where you might need to have someone else act on your behalf (for example, to sign a release). Also, depending on your ages and health status, it may be advisable for both of you to consider having a power of attorney that names a third party to manage your affairs in the event both of you become mentally incapable.

The tax and legal consequences of transferring assets to joint ownership will vary, and you should never undertake this without tax and legal advice. You must first determine whether you wish to hold assets in joint name for convenience purposes only, or whether you also wish to have assets pass to the surviving holder on death. When you transfer assets to joint ownership with right of survivorship, you are generally considered to be making a gift. The tax consequences of gifting to family members and others may give rise to a disposition at fair market value in certain instances. Such transfers to your spouse or to persons under the age of 18 may also give rise to application of the attribution rules. Again, there are many tax as well as legal issues and seeking professional advice is essential.

Trusts

Transferring your assets to a trust is another option to consider in planning for incapacity. Instead of acting under a power of attorney, your trustee would have the power to control the management and investment of trust assets for your benefit during your lifetime. On death, the trust fund could go to other beneficiaries. Transferring assets to a trust may have significant tax and legal consequences, therefore appropriate tax and legal advice is essential. If you own property or reside some of the time outside of Canada, professional legal advice will be necessary to determine whether your power of attorney will be effective and whether it is advisable for a separate power of attorney (including for personal care) to be executed under the laws of the relevant jurisdiction.

For more information on power of attorney and other financial planning matters, contact your CIBC Wood Gundy Investment Advisor.

Lease note that applicable rules and procedures differ in the provinces of Quebec and British Columbia and may vary in other provinces.

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