



Appointing a power of attorney



Planning ahead

We all have financial management obligations that we fulfill on a regular basis. These may be relatively simple tasks, such as paying bills or depositing cheques, or more complex, such as negotiating a mortgage or rebalancing an investment portfolio. Sometimes, however, there may be times when you are unable to carry out these tasks. For example, you might be out of the country and beyond communication for an extended period. Or, in a worst-case scenario, you might be temporarily sidelined by illness or injury.

To safeguard your assets in situations like these, you may need a power of attorney. This legal document enables you to appoint someone you trust to manage your financial affairs should you be unable to do so yourself. By granting an enduring or continuing power of attorney¹, you can receive assistance that will continue even if you become mentally incompetent.

This booklet outlines how a power of attorney can provide flexibility and security for managing your financial affairs at a time when you are unable to manage them yourself, for whatever reason. It also covers some other options you may want to consider to provide similar security and peace of mind for you and your family. Finally, this booklet is provided to you on an information-only basis, and we recommend that you seek proper independent guidance and advice prior to making any decision regarding the management of your financial affairs and estate.

Determining your needs

Do you need a power of attorney? The answer will depend on your specific situation, your wishes and the types of assets you own.

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Prior to implementing any strategies contained in this brochure individuals should consult with a qualified tax advisor, accountant, legal professional or other professional to discuss implications specific to their situation.



To make it work most effectively for you, take the time now to identify your immediate short-term and potential long-term needs. Consider your health and current age, your family situation, your travel plans, the nature and value of your assets and any plans you may have for your estate. You may have significant assets or assets that require regular monitoring and management (such as an investment portfolio or rental real estate) or existing loans (such as a mortgage), and you may have a spouse, children or other dependants who rely on you for financial support. Or, you may simply want to ensure that your normal banking needs are met no matter what your own abilities are in dealing with them in the future. This may include the need to borrow in the form of an overdraft, credit card, loan or even mortgage. In many cases, a properly drafted power of attorney could help protect you, your loved ones and your belongings.

What is a power of attorney?

In simplest terms, a “power of attorney for property” legally entitles a person or persons of your choice to act on your behalf and conduct your financial affairs should you be unavailable or unable to manage them yourself.

The most common reasons for granting a power of attorney:

- So that necessary financial transactions can be completed in your absence (valuable if you should be away from home for extended periods of time)
- So that your financial affairs can be properly administered as you age and perhaps become physically or mentally unable to do so yourself
- So that your personal finances will continue to receive the attention they need in case you are ill or injured (perhaps unconscious) and incapable of making your decisions known

In most jurisdictions across Canada², the person who sets up the power of attorney is known as the “donor.” And the individual chosen to act on the donor’s behalf is called the “attorney.” Anyone of legal age and capacity can establish a power of attorney, regardless of the value of assets to be managed.

Powers of attorney with restrictions

A power of attorney can be restricted, permitting your attorney access only to specific assets, such as bank accounts held at a particular financial institution, or it can be all encompassing, extending to include all of your financial assets and loan facilities, wherever they are located. A power of attorney can also exclude certain portions of your assets that you may wish to continue managing yourself, such as real estate or brokerage accounts. You may also wish to restrict your attorney from dealing with existing loan accounts or borrowing or pledging your assets as collateral for such items as loans, lines of credit or mortgages.

You can establish a power of attorney that’s valid only for a specific period of time, or you can make it continue indefinitely based on certain conditions, which may vary from province to province.

A power of attorney automatically ceases in a number of circumstances, including the following:

- If you or your attorney passes away (unless you have named a substitute attorney)
- If either you or your attorney becomes bankrupt
- If you become mentally incapacitated, unless your power of attorney specifically contemplates this (the next section covers this topic in more detail)
- If you revoke it

You can change or revoke an existing power of attorney at any time as long as you have the legal and mental capacity to do so.

Enduring powers of attorney

As mentioned, a power of attorney generally ceases if the donor becomes mentally incapacitated. There are, however, two important exceptions to this general rule. An “enduring” or “continuing” power of attorney is one designed to continue to be in effect if you become mentally incapacitated. A “springing” or “contingent” power of attorney is one designed specifically to come into effect only in the case of mental incapacity.

You don’t need a separate document; although, some people prefer to have separate non-enduring and contingent powers of attorney so that their affairs are dealt with differently upon their incapacity. By including a continuation clause, a power of attorney can survive the donor’s mental incapacity³, subject to certain conditions⁴. Without it, the power of attorney automatically ceases should the donor become mentally incapable.

Many people, especially those suffering from a partial disability or chronic illness, choose to establish an enduring or springing power of attorney. It provides them the security of knowing that their property will continue to be managed by their appointed attorney if they become physically or mentally unable to handle their own affairs. An enduring power of attorney also ensures that your attorney can continue acting in your interests if injury, illness or age leaves you mentally impaired.

If you become mentally incapacitated and you don't have an enduring power of attorney, the courts may appoint a public trustee, public guardian, public curator or individual recommended by your family to act on your behalf, depending upon your situation and the jurisdiction in which you live.

The legalities

In order for a power of attorney to be legally binding, both the donor and the attorney must be mentally competent and of legal age (age of majority). In addition, the power of attorney must be witnessed. The age of majority and witnessing criteria vary from province to province, so professional assistance is recommended to make sure your power of attorney complies with legislation.

Lawyer's power of attorney

A lawyer's power of attorney is a document created specifically for you by your own lawyer or notary. Your legal counsel can offer you independent legal advice that can make the document difficult to challenge, helping to ensure that your wishes are met. If necessary, your lawyer can visit you at your home, the hospital or your nursing home to offer access to professional advice while accommodating any physical limitations.

Standard forms

As an alternative to a lawyer's power of attorney, some financial institutions offer standard power of attorney forms that you can use if you need a power of attorney only for assets and loan accounts held at a particular financial institution, and if you plan to name only one attorney. For your protection, the financial institution will usually require you to sign the form in the presence of a bank officer who is able to

identify you as the donor, if provincial witnessing requirements permit. Free government approved power of attorney kits, originally created to help disadvantaged individuals who could not afford a lawyer, are also available from various sources.

Some risks of using standard power of attorney forms:

- Because the blank power of attorney form can go home with the client, there is a greater chance it could be improperly signed or witnessed, in which case it may not be valid.
- If the financial institution cannot be sure the form was signed voluntarily, it may not recognize the power of attorney.
- People who are not legal professionals may give improper advice or have an inadequate understanding of the form.
- The client may inadvertently sign multiple forms, causing confusion and making other power of attorney forms invalid.

Be sure to seek professional legal advice before having a standard power of attorney form drawn up. The standard form may affect your existing powers of attorney in ways that you hadn't intended.

You should also consult a legal professional if you plan to name multiple attorneys or need a document that covers different kinds of assets and accounts at various institutions, as well as other investments, holdings and loan facilities. A legal professional will be familiar with the legal requirements where you live and can offer valuable information and advice⁵ when it comes to choosing the right attorney(s).



Choosing an attorney

A power of attorney is an extremely powerful document. Depending on the specific situation, you could be granting your attorney wide-ranging powers over almost everything you own and you may owe to others. Many people turn to their spouse, children, trusted relative, family friend or professional to act as their attorney. Others enlist the services of a trust company.

It's an important decision

Given the authority and discretion that an attorney can exercise over your assets and loans, and the potential for misuse, choosing the right individual is extremely important. The checklist on page 13 provides some useful guidelines. You may want to discuss potential candidates with someone you trust, such as your lawyer or notary, a social worker, a member of the clergy, a close friend or a family member.

Risk of abuse

Choosing an attorney is an important decision requiring careful consideration as there have been instances where representatives have used this power inappropriately for their own benefit, rather than solely for the benefit of the donor as intended.

Types of abuse may include:

- Stealing from the donor's bank account using their bank card and PIN
- Improper use of the donor's credit card
- Borrowing against or mortgaging the donor's property

You can choose more than one individual, giving each equal power or dividing responsibilities according to the capabilities of those involved; although, no more than three are generally recommended. Should you decide to appoint multiple attorneys, be sure that your power of attorney document clearly sets out the powers of each attorney, indicates whether they may act alone or together and outlines some kind of mechanism for resolving any disputes among them. You should also name a substitute (or substitutes) in case your first choice passes away or is unable to take on or continue with the responsibilities.

Remember, you can revoke an existing power of attorney and appoint a new attorney at any time. You may want to do this if you have concerns about the way your attorney is discharging their obligations, or if your situation changes and you consider the person currently named to be no longer suitable.

To revoke your power of attorney, send written notification as soon as possible to anyone taking instructions from your attorney, including your financial institution. Contact your lawyer or notary for assistance.

Power of attorney checklist of attributes

Who should you choose to make decisions for you if you are unable to manage your own affairs? This checklist will help you make an appropriate selection.

In most cases, the best power of attorney is someone who:

- Is trustworthy
- Is financially responsible and independent, and therefore, less likely to be tempted to draw on your assets or credit facilities for personal use
- Makes you feel comfortable with their access to your personal information
- Is familiar with your personal wishes and situation
- Is younger than you and therefore not likely to predecease you
- Is older than the age of majority in your province or territory
- Has both the time and skills needed to manage your affairs appropriately
- Lives near you and/or the assets and loans that will need to be managed
- Is willing to take on the responsibilities

Attorney's role and responsibilities

Acting as an attorney is a tremendous responsibility and one that should not be given — or taken on — without careful consideration. By law, the attorney is required to act under the direction of the donor, assuming they are competent; and to act exclusively for the benefit of the donor. The attorney should maintain a paper trail to demonstrate that all actions taken, including any spending of the donor's money or drawing on existing credit facilities, have been for the donor's benefit. This is also the case when executing a new loan or mortgage under a power of attorney.



The specific functions that an attorney performs will vary according to the personal needs of the individual donor and the assets to be managed. One thing the attorney cannot do is alter the donor's will. Any guidelines and restrictions should be clearly outlined in the power of attorney documentation.

For example, you may require your attorney to perform only regular banking transactions such as writing cheques or making withdrawals or loan payments, either in your absence, during periods of incapacity or on a regular basis. Your attorney might execute investment transactions on your behalf — depositing interest cheques, renewing GICs and buying or selling mutual funds or stocks according to your instructions. If you prefer, you can grant your representative the authority to make investment decisions for you. You could also have your attorney manage business interests, charitable donations, real estate holdings or taxes if you wish.

You have a great deal of flexibility to give your attorney wide-ranging authority or to restrict it to specific assets or situations. Your power of attorney should reflect your specific needs today, taking into consideration your potential needs for tomorrow.

Attorneys, particularly those who are not direct members of the family, are typically compensated for the services they provide according to a predetermined formula. Some donors may choose not to compensate a family member who acts as attorney. The amount and form of any payment should be specified in the document.

Other options to consider

Depending on the types of assets and loan facilities you have and the assistance you require, the following alternatives may also help you manage your day-to-day financial affairs.

Your attorney may require the need to borrow in the form of a loan or mortgage and/or pledge your assets or home as collateral, provided it is in your (the donor's) best interest. As with all matters that the attorney will complete on your behalf, you are bound by their decisions.

Some of the options outlined below involve a change or transfer in the ownership of your assets, a decision that can have serious implications on your tax situation and your estate plan. Professional legal advice is strongly recommended before initiating any such change.

Electronic credits and automated bill payments

If you are away from home for long periods of time or have mobility issues, you may want to consider having regular income payments deposited directly into your bank account. Payroll earnings, pensions, Old Age Security benefits, interest earnings on maturing investments and dividends can usually be electronically credited to your account, reducing your need to bank in person.

Similarly, you can arrange for automatic bill and loan payments through your financial institution, or you can pay bills and loans personally using telephone or online banking. These easy solutions give you maximum control while ensuring that you receive your expected income and always pay your bills on time.

Joint ownership⁶

In some instances, holding assets jointly with your spouse, child or other trusted individual may be an appropriate solution for dealing with

everyday financial matters. (Note that if you have established a power of attorney, you do not also need to make your accounts joint with your attorney; in fact, doing so can cause unnecessary complications.)

"Joint tenancy" is the term used to describe the shared ownership of an asset legally registered in two names. Many spouses routinely open joint bank accounts so that they both can have access to funds for general household or everyday expenses. The right of survivorship means that if one of the joint owners dies, the assets automatically become the property of the survivor.

The dangers of joint tenancy

While joint tenancy offers many of the same benefits as a power of attorney, as well as some potential estate planning advantages, it can also pose certain risks. Once you have named another party as the joint owner of an asset, and your directives indicate that either of you can act in regard to your assets (as opposed to acting jointly), there is no way to prevent them from using that asset in ways you may not have intended.

Here are some possible risks:

- When the joint accountholder becomes sole owner of all your account savings upon your death, they could maliciously withhold part of an inheritance from others. This can be challenged in court, but can be a lengthy and costly process.
- If your son or daughter is your joint accountholder and gets divorced, the money in the joint account could be deemed the adult child's marital assets and be split with their former spouse.
- If your joint accountholder defaults on their credit card, loans or mortgage, the money in the joint account is at risk of being seized.
- If the joint accountholder gets sued, your account life savings could be seized by the judgment creditor.

Be certain you understand all the consequences of joint tenancy before making any changes. If you have any concerns, consult with a professional or consider limiting jointly held assets.

Transferring ownership

Another option that will limit the assets you must manage on a daily basis is simply to transfer specific properties or holdings to a family member or other individual. This should never be done merely as a matter of convenience. Once you give your property away, you cannot get it back if you change your mind or suddenly find you need it.

In addition, transferring capital assets that have increased in value since you purchased them may trigger a taxable capital gain. Be sure to discuss your plans fully with professional counsel before making a commitment.

Alter ego or joint partner trust

If you are over 65, you may want to consider an alter ego or joint partner trust. With an alter ego trust, you can transfer some or all of your assets into a trust of which you are the beneficiary. The assets will be managed by one or more trustees, who are legally bound to manage such assets for the benefit of the beneficiary of the trust (that is, you) in accordance with the directions set out in the trust deed.

Ordinarily, when assets are transferred to a trust, a deemed sale takes place, which may trigger sizeable capital gains tax if the transferred assets have increased in value. But with an alter ego trust, any potential tax implications are deferred until the death of the trust beneficiary.

With a joint partner trust, both spouses are beneficiaries of the trust and there are generally no tax implications until both spouses have passed away. However, this trust tool must fit your situation, and you should discuss its ramifications with your professional advisor.

The material in this brochure is intended as a general source of information only, and should not be construed as offering specific tax, legal, financial, investment or other advice. Every effort has been made to ensure that the material is correct at time of publication, but we cannot guarantee its accuracy or completeness. Interest rates, market conditions, tax rulings and other investment factors are subject to rapid change. Individuals should consult with their professional tax advisor, accountant, legal professional or other professional before taking any action based upon the information contained in this brochure to ensure that individual circumstances have been considered properly and it is based on the latest available information.

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¹ In Quebec, an enduring or continuing power of attorney is called a “mandate given in anticipation of incapacity.”

² In Quebec, the terms “mandate,” “mandator” and “mandatary” are used instead of “power of attorney,” “donor” and “attorney.”

³ This is not the case in Newfoundland and Labrador, where a limited power of attorney is automatically terminated if the donor becomes mentally incompetent. In Newfoundland and Labrador, as in all other provinces except Quebec, which is subject to particular rules, a general power of attorney with a continuation clause is needed to be effective in the event of mental incapacity.

⁴ In Quebec, for instance, a mandate given in anticipation of incapacity will not come into effect until a court has determined that the mandator is not competent, and has therefore issued a formal judgment on the matter.

⁵ In Quebec, a mandate given in anticipation of incapacity must be drawn up before a notary in notarial act en minutes or in the presence of witnesses. Any other type of power of attorney may be drafted by the mandator without additional formalities.

⁶ Although assets may be held jointly in Quebec, the concept of joint tenancy does not exist under Quebec law; i.e., the right of survivorship is inapplicable to assets held jointly in Quebec.

The information contained in this brochure is intended only as a general guideline and should not be considered as a substitution for seeking your own legal and financial advice. While this information was accurate at the time of publication, powers of attorney are governed by provincial legislation, which is subject to periodic change. This document is also available in French. Ce document est également disponible en français.

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