Incapacity — planning ahead helps

Physical and mental decline due to aging are a part of life. Like an up-to-date Will, a power of attorney is an important tool in financial and estate planning. Planning ahead in case of serious disability or health problems allows decision-making relating to property or personal care to proceed without unnecessary disruption.

Quebec residents
The province of Quebec follows laws set out under the Civil Code of Quebec. This differs from the other provinces in Canada, which are governed by common law principles and provincial statutes. Generally, the principles of powers of attorney (called mandates in Quebec) are similar in all provinces. However, there are some aspects in which both the method of implementation and the terms used differ.

What is a power of attorney?

A Will gives an executor or liquidator the authority to manage someone's affairs after death, whereas a power of attorney gives the person named (called an "attorney," "donee" or, in Quebec, a "mandatory"), the power to make decisions on your behalf while you (the donor) are still alive. These decisions can be financial or, where provincial law permits, personal in nature, or both. A power of attorney, like your Will, is an integral part of your overall estate plan.

What is a power of attorney for property?

A power of attorney for property can be limited or general in nature. The attorney can be restricted in authority to, for example, sell only certain securities, or conduct banking activities only while the donor is out of the country.

Most financial institutions use a stock power of attorney when accepting share certificates on behalf of a client. This document limits the power to the specific account or shares described. A general power of attorney will have no restrictions on the scope of financial matters with which the attorney may deal except the inability to make or change the donor's Will. An individual who is regularly out of the jurisdiction where his or her assets are located, or who anticipates diminished capacity due to age or illness, would likely opt for a general power of attorney.

Where provincial law permits, powers of attorney for property can be continuing (or durable), meaning that they will still remain in effect if you become mentally incapable. If you do not have a continuing power of attorney and you become unable to manage your own affairs, your family or friends could be faced with a time-consuming and expensive legal process to get the authority to manage your financial affairs.

In the province of Quebec, two separate powers of attorney, commonly known as mandates, may be required. One is effective while the donor is capable, and the other comes into effect if the donor becomes incapacitated.

What is a power of attorney for personal care?

In those jurisdictions where it's recognized, a power of attorney for personal care ensures that someone is authorized and prepared to make decisions of a personal nature on your behalf, should you become incapacitated. Unlike a power of attorney for property that may by its terms be effective both before and after incapacity, this power of attorney comes into effect only on your incapacity.

You can appoint as your attorney for personal care the same person as your attorney for property, or you may name someone else. Depending on the province you live in, decisions about where you would live, what you would eat, or medical treatment you would receive would be the responsibility of your attorney for personal care. In some provinces, you can appoint a substitute decision-maker only for medical decisions.

Some provinces, such as British Columbia and New Brunswick, allow you to combine your power of attorney for property with a power of attorney for personal care.

Mandate given in anticipation of incapacity — the Quebec situation

Under the Civil Code of Quebec, an individual called the mandator can name another person or a trust company as the mandatory to make decisions on his or her behalf if mental incompetence occurs. The mandatory must apply to the courts to certify the mandator's incapacity before the mandate can become effective. This application will require a psychological and medical assessment of the mandator.

A single mandate document can be used to empower the mandatory regarding the mandator's finances, personal care, health care directives or living Will and/or organ donation instructions.

What is a living Will?

A living Will (sometimes known as an advance health care directive) may be included in a power of attorney for personal care. However, it is often written as a separate document. A living Will provides instructions about the type and intensity of medical treatment a person wants to receive (or not receive) if he or she is incapable of making decisions. Initially restricted to cases of a terminal illness or incurable condition, more recent versions have a broader scope, including the acceptable range of medical procedures.

Living Wills tend to be completed primarily for guidance to the individual authorized to make medical decisions for an incapable person. They are not recognized in all jurisdictions.

Whom should I choose to be my attorney?

The term "attorney" means a decision-maker, and should be distinguished from "attorney-at-law", which is the term used to refer to a lawyer in some jurisdictions, mainly in the United Sates. Many people name a spouse or adult child, or someone close to them. Attorneys must understand what their responsibilities are and be able to manage the affairs for which they may become responsible.

It is important that you give careful thought to who can control your assets and well-being. Your attorney should be someone you completely trust, and who you know will act in your best interest. You can have more than one attorney, but if you do, you should clearly detail whether they must act together, by majority rule, or on an individual basis.

If possible, it is advisable to appoint an attorney for property who is knowledgeable in financial matters, or who will know when to get professional help. It is also possible to name a professional trust company as attorney for property. This can be especially useful since the attorney has to act for the lifetime of the incapacitated person. It's a good idea to talk to whomever you plan to appoint to make sure that person is able and willing to assume this responsibility. Make sure you and your proposed attorney discuss the matter of compensation, and incorporate your joint understanding into the power of attorney document.

Giving power of attorney to someone does not take away your power to act personally (subject to any limitation contained in the document relating to your mental condition). It may, however, authorize the attorney to share that power concurrently with you in the case of property, but not for medical care (as the power of attorney comes into effect only upon your incapacity).

What does a power of attorney document look like?

The forms for power of attorney are designed according to the applicable provincial legislation. All documents include:

- The name of the donor
- The name of the attorney
- The specific authority being given
- The witnessed signature of the donor

As with a Will, the donor must be mentally competent, or "of sound mind" according to the criteria set out in provincial statutes when the power of attorney is signed. A person whose mental faculties are failing must have chosen an attorney to act on his or her behalf and have executed a power of attorney while still competent. Otherwise the person will not be able to choose who will act.

Why is legal advice so important?

To minimize the likelihood of legal challenges later on, a lawyer should be consulted to draw up a power of attorney at a time when a donor's mental abilities are unquestioned. If there is any doubt, it is wise to have a doctor or other qualified person assess the capacity of the donor before executing the power of attorney. A lawyer can also assist the donor in understanding the uses to which a power of attorney can be put, and in the case of a power of attorney for property, appreciate the authority another person will be able to exercise regarding the donor's financial decisions.

What is the role of the Public Trustee?

It is a misconception that the government is waiting to take over your assets whenever possible. In some cases, the Office of the Public Guardian and Trustee (PGT) (or the provincial variation of this office) will manage an individual's assets and property if the individual is incapable of doing so personally but has not signed a power of attorney.

Even then, in Ontario, a family member can apply to the PGT to be appointed as statutory guardian, attorney or representative. Other provinces have similar roles, but a legal advisor should be consulted in your jurisdiction about the details of the legislation.

The Public Trustee assesses all applications and may require even close family members to post bond or security and file a management plan that will in turn be monitored by the Public Trustee. The Public Trustee will step in as required, and can take possession of and make decisions about bank accounts, bonds and all other assets. The decisions made may not be the decisions preferred by an individual or that individual's family members, so it is always better to plan ahead and draw up a power of attorney.

Are there alternatives to powers of attorney for property?

Joint interests with right of survivorship (not recognized in Quebec)
Bank and/or investment accounts held in joint name with your spouse (or other trusted person) may reduce the need for a power of attorney, as long as they are set up so that either party can sign or complete transactions.This does not mean that a general power of attorney for property is no longer necessary; rather joint ownership can be an effective complement to the proper use of powers of attorney.

If you own individually held or jointly held real estate you will need to consider giving your partner power of attorney so that transactions can take place if either of you becomes incapable. Depending on your ages and health, it might be advisable for each of you to consider having a power of attorney naming a third party to manage your affairs if one or both of you become mentally incapable.

You and your advisor should discuss the tax and legal consequences of transferring assets to joint ownership.

Revocable trusts

It is possible to place some of your assets into a revocable inter vivos trust in place of a power of attorney. This type of trust is created during an individual's lifetime, under which the individual has retained the power to end the trust and demand that the trustee return the property to him or her. Some elderly individuals create a revocable inter vivos trust when they no longer wish to personally manage their assets, or in anticipation of a period of time when they may be unable to do so (e.g., when faced with a lengthy recuperation).

These persons can demand the return of the assets if they wish to do so in the future. Unlike a power of attorney for property, the transfer of assets to a revocable inter vivos trust does involve giving up title to those assets (at least until the trust is revoked). There are tax implications connected to this alternative that should be discussed with a legal advisor.

Final analysis

A power of attorney is only one aspect of a comprehensive estate plan. Legislation is continually changing, so a review of your powers of attorney and your will are strongly recommended. You should consult a lawyer in your province or territory before executing any of these documents.

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