



Client Information Summary

Powers of Attorney – Uses and Planning Points

Anyone with assets needs an Estate Plan. Estate planning is the art of designing a plan for the effective enjoyment, ownership, management, and disposition of assets (during life, upon death, and after death), at the minimum cost. As a part of an overall Estate Plan, it is essential to have properly prepared and executed Powers of Attorney.

Power of Attorney for Property (also referred to as Continuing or General Power of Attorney)

Most people complete a will and appoint an executor to act on their behalf after their death in order to have their estate managed and distributed according to their wishes and intentions. Yet, many of these same people fail to complete a Power of Attorney to appoint some trusted person to act as their agent to manage their financial affairs should they become incapacitated. Similar to the authority granted to an executor in your will to act upon your death, the attorney appointed in your Power of Attorney has the authority to carry out your wishes while you are alive but incapacitated. Once appointed, your Attorney has the authority to carry out virtually any legal or financial action except to modify or make a new will. The creator, or giver, of the Power of Attorney is known as the donor (or grantor). The Attorney takes care of the donor's financial affairs, by managing and investing their assets and paying debts on a timely basis.

While the word "Attorney" has come to mean lawyer in the U.S., its original meaning is someone who has been appointed to act for you. With a Power of Attorney you designate a trusted person, such as a spouse, friend, relative, or a professional, to act for you under certain conditions. Where more than one person is named, it may be stipulated that they act only together (jointly), or they may be permitted to act individually (severally), or either way (jointly and severally). Where spouses name each other as Attorneys, it is wise to also name a substitute attorney in case of a joint disaster or common accident. In all cases, a Power of Attorney is terminated upon the death of the donor. It is also terminated where the donor becomes mentally incapacitated, unless the Power of Attorney specifically states otherwise with an enduring or continuing clause. Most Powers of Attorney may be given and revoked at any time, provided the donor has the legal capacity to make these decisions. Assessing mental capacity is a specialized profession, with capacity assessors registered with the provincial government. Capacity assessors can be doctors, nurses, psychologists or psychiatrists and there are specialized courses that they take to become registered.

Most people mistakenly feel they are protected as long as they have a will, but consider the state of your personal financial affairs if you are involved in a car accident and lapse into a coma. Or, you grow forgetful with Alzheimer's disease or, have a stroke which partly incapacitates some of your thought patterns, memories, and mobility. Can someone else pay your bills, handle your financial affairs, and manage your assets, if and when you cannot? The answer is "no unless you have appointed someone through a Continuing Power of Attorney.

Contrary to popular belief, even your spouse cannot act for you while you are alive and unable to act for yourself,

since each of you are legally separate individuals in law. A spouse or relative will have to use their own resources to pay your bills, or apply to the court to be placed in charge. This can incur thousands of dollars in needless expenses or lost opportunity for investment decisions while waiting for the legal process to be completed. In order for your application to succeed, a judge must be convinced of the need for an attorney based on the medical affidavits and records used to back up the case. A complete set of financial records of the incapacitated person must be compiled and submitted, which includes a detailed list of all the assets and liabilities -along with an extensive management plan. Conflicts can arise if another person has reasons to challenge the application or request that the judge place them in charge as a better alternative. Another possibility is the court may grant only partial control.

It is insufficient for spouses to use the oversimplified approach of just making arrangements at the bank to have access to each other's bank accounts, or to have one joint account. This leaves every other asset and liability untouched without a court order. Often overlooked and not considered, are very important assets such as the family home and investment assets. It is possible that a mortgage may not be renewed. If physically incapacitated for some duration, it may be appropriate to sell a two storey home to move into a one level home but this may be impossible to implement if the current home is jointly owned by both spouses and one of the spouses does not have the capacity to sign. Ontario laws stipulate that consent and signatures of both spouses are required in order to sell or remortgage the family home even if the home is in one spouse's name. A financial nightmare can be averted with a Continuing Power of Attorney.

A specific or limited Power of Attorney is used to authorize an Attorney with limited powers for specific actions, or execution of related documents, which generally expires with the completion of the action itself. A general Power of Attorney is to authorize the Attorney with more broad powers. A restrictive clause in a general Power of Attorney will subject the Power of Attorney to be used under specific conditions and restrictions (such as emergencies, extensive travel plans, or other specified events). A revocation clause will revoke any prior Power of Attorney or any delegation of authority to an agent previously given. A continuing clause is essential in order for the Power of Attorney to be valid during subsequent legal incapacity on the part of the donor.

Under the Mental Health Act, a doctor at his or her discretion, finding someone no longer competent to handle their own affairs, is required by law to send notice to the Office of the Public Guardian and Trustee, thereby automatically making the government that person's trustee and attorney, regardless of what they wanted when they were competent. Under existing legislation a family member must make application for control before the Office of the Public Guardian and Trustee supplying the Power of Attorney as proof and requesting administrative authorization. The Office of the Public Guardian and Trustee must hand over control within 30 days unless it has justifiable reason otherwise, such as anticipated mismanagement. Any contested application can become protracted, especially if no Power of Attorney exists, or where another family member may want to take control.

Another reason to have a Power of Attorney is that if none exists, or a Power of Attorney exists but without an enduring or continuing provision, security equal to the value of the assets to be controlled must be posted. Without a valid Power of Attorney, an application for control to the Office of the Public Guardian and Trustee must include a management plan, which is an extensive accounting document to be completed at considerable expense. In the event that no Power of Attorney exists and the individual is incompetent, such as with Alzheimer's disease, but is not yet certified pending tests and observations, an applicant will still have to go to court.

Power of Attorney for Personal Care

The Personal Care Power of Attorney allows you to appoint an Attorney, in advance, to make personal care decisions for you if you become mentally incapable. Decisions about personal care involve things such as where you live, what you eat and the kind of medical treatment you receive. You may give your Attorney special instructions about the particular kind of care you want - or don't want - in certain situations.

The Substitute Decisions Act, passed in 1995, clearly recognizes advance directives, in writing, to specify the kind of medical treatment an individual would and would not want to receive if they are unable to communicate with medical personnel. In addition, the legislation recognizes the authority by designated decision-makers to consent to, or withhold consent for, medical treatment when you are no longer able to. Circumstances that cannot be anticipated on paper with the advance directive can be dealt with as the events and conditions occur by the Attorney, who should have a good understanding of the patient's wishes and philosophy of life.

The purpose of this Client Information Summary is not intended to replace legal advice from your lawyer. We recommend that all persons reading this seek qualified independent legal advice on this issue, as with all legal matters. The information herein is intended only for the purpose of illustrating the context, application and uses of Powers of Attorney.



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