



You've Got the Power! Planning for Incapacity

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A basic estate plan considers what will happen to your estate in the event of your death. It includes a will that names the beneficiaries (heirs) who will receive your estate assets and specifies how liabilities will be satisfied. A good estate plan goes beyond a basic will and includes strategies to maximize your estate value and meet the needs of your beneficiaries in an efficient and timely manner.¹

A more comprehensive estate plan, however, should include not only plans for the needs of your surviving beneficiaries in the case of death, but also plans for management of your finances if you should become unable to manage them by yourself. This is a step that is often overlooked in estate planning.

There are a number of reasons that you may become unable to manage your financial affairs during your lifetime. For example, you may have an accident or illness that leaves you physically unable to carry out financial tasks. Or you may, at some point in the future, lose mental capacity, due to conditions such as Alzheimer's disease or other forms of dementia.

A Power of Attorney² is a document that allows you to name another person (known as your "attorney") to make decisions and conduct transactions on your behalf. While many people think that an "attorney" must be a lawyer, this is not true. You can select anyone of legal age,³ or even a trust company, to serve as your attorney under a Power of Attorney.

There are two types of Powers of Attorney⁴:

- A **Power of Attorney for Property** (also known as a Financial Power of Attorney) allows your attorney to conduct financial transactions for you.
- A **Power of Attorney for Personal Care** allows your attorney to make decisions for your health care in the event of your incapacity.

Although both of these types of Powers of Attorney should be part of your estate plan, this report will focus on the Power of Attorney for Property, which we will refer to as a "POA".

¹ Two other CIBC reports (*Your Estate Matters: Common Traps and How to Avoid Them* and *Willpower: Common Will Planning Mistakes and How to Avoid Them*) looked at common issues in basic estate and will planning. These reports are available online in the "Estate Planning" section at <https://www.cibc.com/en/personal-banking/advice-centre/tax-savings-tips.html>.

² Some provinces prohibit personal or health care providers for compensation from being attorneys.

³ Depending on your province of residence, a Representation Agreement may serve the same purpose as a Power of Attorney. In Quebec, a Power of Attorney is also called a mandate and the attorney is called the "mandatary".

⁴ In Quebec, a Protection Mandate can cover both property and personal care. Your mandatary will not have any power to act under a Protection Mandate until the document is officially validated by the Court (a process known as "homologation.")

A POA can be created to endure for different periods of time:

- A temporary POA is only effective for a limited time or for a specific transaction.
- A non-continuing POA is effective from the date that it is created but becomes invalid if you become mentally incapacitated.⁵
- A springing POA is only effective from the time that you become mentally incapacitated or some other stated contingency.⁶
- A continuing (or enduring) POA is effective from the date that it is created and continues to be valid even if you become mentally incapacitated.⁷

When creating an estate plan, remember that only a specifically worded springing POA or continuing POA will be effective in the event of incapacity. All personal POAs become invalid upon death.

The powers granted to the attorney under a POA can be very broad. For example, you may give an attorney the power to conduct all of your financial activities. That said, the attorney is not you. Powers given under a POA cannot include the ability to create or amend a will on your behalf. Third parties who have to deal with the attorney may have certain requirements or restrictions when dealing with the attorney instead of you.

Let's focus on a couple of mistakes that are relatively common when planning for incapacity.

Mistake #1: Keeping it Informal

Day-to-day financial management can be complex and time-consuming. It can include making banking deposits and withdrawals, writing cheques, paying bills, making purchases, and undertaking investment decisions and transactions. Since many of these financial activities are personal, people often reach out to friends and family for assistance. In a CIBC poll,⁸ one in ten respondents said they were managing the financial affairs of an elderly, disabled or otherwise incapable family member or close friend. However, among respondents providing financial assistance, two thirds said the arrangement was not formalized in any type of documented agreement.

When arrangements are informal, misunderstandings can be common. An often-used informal arrangement involves setting up a joint account for financial transactions. For example, suppose Margaret was having difficulty managing her finances as she aged and wanted one of her three children to help her. Margaret added her son, Andrew, as a joint holder on her bank account so that he could access the account to pay her bills and withdraw cash for her ongoing purchases. What Margaret did not realize was that, even though she did not intend for Andrew to have the funds for his own personal use, as a joint account holder Andrew could use the bank account funds in any way that he wished and the funds would belong solely to Andrew upon her death in most provinces⁹. If Margaret had formally documented her intentions, it would have been clear that Andrew's duty was to use the funds only for Margaret's expenses. Furthermore, with formal documentation the remaining account balance might be passed to estate beneficiaries of Margaret's choosing, which could include her other children, as well as Andrew.

Creating a POA is the best way to formally document how you would like someone to manage your financial affairs if you are not able to do so personally. Should you become incapable and are unable to express your wishes, perhaps due to an accident or mental incapacity, a POA is essential.

⁵ In Quebec, a mandate that was in effect before incapacity will continue to be in effect during the homologation proceedings, unless it is revoked by the court for a serious reason. (See footnote 3 regarding homologation.)

⁶ In Quebec, a Protection Mandate serves the purpose of a springing POA.

⁷ A continuing or enduring POA does not exist in Quebec. The homologation process (in which the document is officially validated by the Court) would still be required for the POA to be effective upon the occurrence of incapacity, assuming it meets the form requirement of a Protection Mandate.

⁸ See "One in ten Canadians managing the finances of a family member or close friend", CIBC, July 27, 2012, which is available online at <https://www.newswire.ca/news-releases/one-in-ten-canadians-managing-the-finances-of-a-family-member-or-close-friend-510517521.html>.

⁹ In Québec there is no right of survivorship if the account holder is resident in Quebec at the time of his/her death.

Without a power of attorney for someone to act on your behalf, someone would have to apply to the court to appoint a guardian or trustee to manage your financial affairs¹⁰, which could take weeks or even months.

To ensure your intentions are known, it's important to plan ahead and see a lawyer to prepare your POA.

Mistake #2: Getting Help from the Wrong People

It was previously reported that 62% of Canadians thought they could use help with their financial management skills.¹¹ Will your friends and family have sufficient financial knowledge should you need assistance with your finances? And what happens if your family members live across town, across the country, or even farther away?

Even when your friends and family are financially capable and nearby, they may be biased in their views of how your finances should be managed. For example, one elderly woman had become accustomed to donating tens of thousands of dollars to charity annually; however, her children resented her charitable gifts because they eroded what was available for their own future inheritances. There have also been instances where people have placed trust in family members only to become victims of financial abuse. The Department of Justice website on elder abuse¹² includes the example of a senior whose daughter secretly racked up purchases from designer clothing stores while helping the senior with online purchases. When asked about the credit card charges, the daughter simply dismissed the senior as being forgetful, notwithstanding that the daughter had numerous new outfits from the online stores.

While these examples may not reflect the norm, they help to illustrate how important it is to carefully consider who you would choose to help with the management of your financial affairs if you were to become incapable. Fortunately, people are becoming increasingly aware of the variety of professional advisors who can help. In the CIBC poll, 74% of respondents could see a benefit in having a professional providing advice on how to best manage the financial affairs of a family member or close friend. When asked which professionals would be best to provide this advice, respondents first selected financial advisors and lawyers (each with 41% of the responses), followed by accountants (with 29% of responses). However, few respondents realized that many trust companies also provide valuable POA services.

When choosing someone to act as attorney under your POA, you should consider the attorney's knowledge and experience in the multiple areas of financial management that may be required. Duties of an attorney can include paying bills, managing budgets, choosing investments, selling property, filing tax returns, and accounting for financial transactions, among others. It's important to choose an attorney who is versed in each of the financial areas that may be relevant; however, not all professionals have experience providing a full range of services. As an example, an estate lawyer who prepares POAs and wills may not have acted as an attorney under a POA before and may have little experience in paying bills, choosing investments or maintaining accounting records. You should look for someone who has capabilities in all of the relevant financial areas, and may want to consider a trust company that offers full POA services.

If you are currently acting as an attorney under someone else's POA, you may find that you need assistance, perhaps because you don't have the time or knowledge to carry out the duties of your role. If you do not live close by, you may have additional challenges administering the POA from afar. In this case, you can hire a trust company that provides services to assist you with the day-to-day financial administration duties of your role. You may have peace of mind knowing that the burden of POA administration will be handled by professionals, while you retain full decision-making authority.

¹⁰ In Québec, a protective supervision regime may be instituted by the Court (tutorship or curatorship). While a family member, friend or any other interested person can apply for the opening of the protective supervision regime on your behalf, the court will ultimately decide the form of the protective supervision.

¹¹ Ipsos Reid poll conducted on behalf of ABC Life Literacy Canada, released May 10, 2011.

¹² <http://www.justice.gc.ca/eng/rp-pr/ci-jp/fv-vf/card-carte.html>.

CIBC Trust has years of practical experience serving as attorney under the POAs of our clients, as well as providing “Agent for Attorney” services to existing attorneys who need assistance with their duties. Our team, which includes legal, tax, financial planning, banking, and investment professionals, combines a vast array of knowledge and skills to provide seamless, integrated services. We manage our clients’ financial affairs in an unbiased, efficient manner according to the specific needs and desires of each client.

Remember the story of the elderly woman who liked to donate generously to charity? She hired CIBC Trust to act as the attorney under her POA. After gaining a complete understanding of her financial goals and circumstances, CIBC Trust managed her personal financial affairs for years and continued making the payments to her favourite charities annually to fulfill her lifetime wishes.

Your CIBC advisor can provide more information about having CIBC Trust act as your attorney under a Power of Attorney, or about Agent for Attorney services.

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As with all planning strategies, you should seek the advice of a qualified tax advisor.

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