



# POA Preparation

Complex estate documents require professional advice

**M**ost people will devote significant energy into the drafting of their will — giving great thought to who should be their executors and guardians of minor children; who will receive treasured personal items or cash bequests; and which family members will share in the estate residue. For those with more complicated estates, these decisions can take months to finalize and are often revisited as personal and financial circumstances change.

As part of the will drafting process, the estate lawyer will usually recommend the preparation of powers of attorney (POA) for property and for healthcare. Unfortunately, the client often does not apply the same level of due diligence when it comes to the preparation of a POA. The result is important issues may not be properly addressed, and the attorney may not even be advised of their appointment and what may be expected of them.

Let's highlight some of the planning issues that should be considered before a client executes a POA for property, and the adverse implications of not doing so. But first, we'll review some basic principles governing POAs for property.

A POA is a legal document intended to provide a person (the attorney) with the power to act on behalf of another person (the grantor) in respect of any property that the grantor owns or controls. All provinces now have legislation that allows a POA to continue to be effective upon the mental incapacity of the grantor. This is known as an enduring or continuing power of attorney.

Recognize that the actions of the attorney can significantly impact the quality of the grantor's life while incapacitated, as well as the financial security of family members and beneficiaries under the grantor's estate. Thus, the decision regarding who will be appointed as attorney is as important as selecting the executor of an estate. In fact, it often makes sense for the

grantor's executor to also be appointed as the attorney or a co-attorney.

This leads to an important planning detail, particularly where the attorney is not a family member. The grantor should confirm in advance that the person is willing to act and is fully aware of their legal obligations as an attorney. Assuming that person agrees to act, the attorney should then be provided with details on the type of investments and other assets currently owned by the grantor, and the location of relevant information and legal documents relating to that property.

The POA should contain guidance and instructions in terms of funding the grantor's lifestyle needs, as well as the making of gifts or loans to family members and/or charitable organizations. These instructions will also serve as a good reference point for others in evaluating whether the attorney is properly discharging his or her duties.

Finally, the grantor should recognize that the POA may only take effect, or be acted upon, many years in the future. Provision should therefore be made for the appointment of alternate attorneys, who can step into the role should the primary attorney (for example, the spouse) become incapacitated, predecease the grantor, or choose not to act. The appointment of an attorney should also be reviewed on a regular basis to confirm that the designated person remains ready, willing, and able to act.

## TO ACCEPT OR NOT ACCEPT POA

In determining whether to accept the role of attorney, some important matters need to be considered, particularly where the attorney is not a family member:

- The attorney may need to protect the grantor against his or her own actions by having the grantor declared mentally incapable. The attorney must be prepared to take on this task, knowing that it may be

emotionally difficult and result in irreparable damage to their relationship.

- The attorney needs to understand that he or she will be held to a very high standard of care while administering any property on behalf of the grantor. Family members might take legal action if they believe the attorney is in breach of his or her obligations.

- An attorney should recognize they may be required to take on this role for many years, particularly if the grantor experiences an early onset of Alzheimer's or dementia.

- While an attorney is entitled to compensation for their time and effort, such compensation is often subject to court approval that requires a full accounting of their administration of the grantor's property. This can be a long and drawn-out process.

The issues involved with naming a POA can be very complex, so consult with professional advisors before finalizing these arrangements. 

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