Obiter

Information Brief

Who will make decisions for you when you can't?

Preparing powers of attorney, and keeping them updated, is more important now than ever. Seniors comprise the largest demographic in Canada and have outnumbered children since 2015. This demographic growth is expected to continue to increase to 2047, when seniors will comprise about 25% of Canada's population.[1] The average Canadian lifespan is currently 84 years for a woman and 80 years for a man.[2] Associated with that increased lifespan is a higher risk of disease. Dementia, which includes Alzheimer's disease, is a frequent cause of disability later in life.[3] It is more common than cancer, heart disease or stroke. The number of people living with dementia is expected to double between 2015 and 2033.[4]

A power of attorney is a legal document that authorizes a named person (the "attorney") to carry out or make decisions (i.e., act as an agent) on your behalf (i.e., you as the "donor" provide the decision making authority). A power of attorney is essential for ensuring that a person you trust while capable, is the one making decisions about your property if you become incapable.[5]

There are generally three different types of powers of attorney available in each province:

1) a general/limited power of attorney for property;
2) a continuing/enduring/springing power of attorney for property; and
3) a power of attorney for personal care and health related decisions (called a Representation Agreement in some provinces).

Each type of power of attorney is outlined below.

General/Limited Power of Attorney ("POAP")

The first provincial statutes provided for this type of document and continue to do so today. A POAP commonly deals with a specific property, does not permit decision making by the attorney-agent, can be time limited and

---

[1]Statistics Canada, online: French: https://www150.statcan.gc.ca/n1/pub/91-215-x/2017000/sec2-fra.htm; English: https://www150.statcan.gc.ca/n1/pub/91-215-x/2017000/sec2-eng.htm (accessed December 11, 2018)

[2]Statistics Canada, online: French: https://www150.statcan.gc.ca/n1/pub/82-003-x/2018004/article/54950-fra.htm; English: https://www150.statcan.gc.ca/n1/pub/82-003-x/2018004/article/54950-eng.htm (accessed December 6, 2018).

[3]Agence de la santé publique du Canada, "Rapport Sur La Conférence: Conférence nationale sur la démence", Aout 2018, online: French: https://www.canada.ca/fr/services/sante/publications/maladies-et-affections/conference-nationale-sur-la-demence-rapport.html; English: Public Health Agency of Canada, "Conference Report: National Dementia Conference", August 2018, online: English: https://www.canada.ca/en/services/health/publications/diseases-conditions/national-dementia-conference-report.html (accessed November 22, 2018); at page 12.

[4]Ibid. at page 23.

[5]The reader is reminded that incapacity can also occur as a result of injury, such as head trauma from a car accident. A power of attorney is not only for seniors.

automatically terminates upon your incapacity by operation of law. Since the agent has no decision making authority and must follow your instructions, you are legally responsible for the acts of the agent. The POAP can be used, for example, if you're selling your home but are unavailable to sign the agreement of purchase and sale. Your attorney would sign the legal document on your behalf, as per your instructions.

Continuing/Enduring/Springing Power of Attorney for Property ("CPOAP")

It is by virtue of the authority provided in provincial law that a CPOAP continues to be valid during incapacity, which is its most important and distinguishing feature. Each province, with the exception of Quebec, has codified the common law by enacting its own statute to permit CPOAPs.[6] A CPOAP generally deals with all of your property and would continue, or be triggered if springing (i.e., only in effect during incapacity but not when capable), during incapacity.

The CPOAP would usually come into effect upon signing. However, you would have the option of limiting the attorney's authority to periods of incapacity.[7] If the CPOAP is effective immediately, your attorney can act as your agent and the law of agency applies to the relationship in the same way as a POAP. The document can be given to service providers so that your attorney can administer your decisions. For example, if you have medical issues that make it difficult for you to walk, your attorney can attend at your bank and withdraw funds according to your instructions.[8]

The attorney's duty rises to the level of a fiduciary when you are temporarily or permanently incapacitated. As a fiduciary, the attorney is required by law to make all decisions in your best interests (among other requirements). If an attorney breaches their fiduciary duty by failing to meet all legal requirements, they would be accountable and potentially personally responsible for the effects of making improper decision.

Power of Attorney for Personal Care/Representation Agreement ("POAPC")

A power of attorney for personal care allows you to appoint an attorney to make personal (e.g., deciding where you will live) and medical decisions if you are incapacitated. These documents may, in some provinces like Alberta, include authority for certain financial decisions related to day-to-day living.[9] A POAPC may take at least partial effect when signed. For example, in Ontario, a decision that falls under the Health Care Consent Act, where the decision is one that the act authorizes, can be decided automatically by your attorney.

If the document identifies incapacity as a precondition for attorney decision-making beyond consent to treatment or that is not automatic under relevant legislation, the document should include how incapacity is to be confirmed and by whom. If it does not, a capacity assessor or qualified practitioner would generally conduct an assessment to determine capacity.

[6]Quebec is the only exception to codification and this document excludes a consideration of Quebec civil law. Each province, in addition, may have different formal requirements for validity and the legislation may govern, for example, gifting or identify the test a grantor must meet for capacity to enter in a CPOAP. British Columbia requires the signature of both grantor and attorney to be witnessed by a lawyer (or other person authorized to commission affidavits/oaths) if the attorney will deal with real property; documents may be registered with the relevant land titles office.

[7]For example, the donor may specify that the written report of a medical practitioner confirming incapacity renders the CPOAP active. If the document is silent on the method of determining incapacity, provincial legislation fills the gap. For example, in Ontario, the Substitute Decisions Act (s 9(3)(a)) states that it would be an assessor who determines whether or not the grantor is incapacitated. In either case, the attorney immediately assumes the role of fiduciary when incapacity is confirmed.

[8]Banks frequently refuse to accept legally valid CPOAPs but have no basis in law for refusing. Should this happen, the issue should be escalated up to management or the bank's legal department for resolution.

[9]Alberta, and most provinces, permits a CPOAP and POAPC to be included in one document. However, most people would not want their bank, and others, to have access to unnecessary personal information such as their treatment or end of life wishes. For that reason, separate documents are frequently preferred.

A POAPC can also include your treatment/non-treatment and end of life wishes. The attorney is obligated to uphold your wishes.

What if you don't have a CPOAP or POAPC?

If you become incapacitated without a CPOAP, someone (including your spouse) will have to apply to the court to be appointed. This generally results in delay, government supervision and more onerous reporting requirements. If you and your spouse own property as joint tenants with right of survivorship, for example, that property cannot be mortgaged or sold until your attorney has been appointed by the court. Dealing with jointly owned property requires all joint owners' signatures.

Certain decisions, such as medical care, may be made in the absence of a POAPC. For example, if you are unconscious, the physician would request consent for treatment from certain people, in descending order, identified in order under provincial legislation. In Ontario, the physician would first look to the person's representative appointed by the Consent and Capacity Board, and if that did not apply, then the person's spouse or partner. If there is no spouse or partner, the person's child, if over the age of 16, would be next, and so on down the legislated list.

Reminder to Review

We strongly suggest that you plan in advance for substitute decision makers, and bear in mind that the law is always changing. These documents should be reviewed regularly to ensure they still meet your objectives and applicable laws.

Patrick A. Choquette, CFP, CIM, CMT
Portfolio Manager
MaxWealth Financial Management of Raymond James Ltd.
Suite 202 - 19978 72 Avenue, Langley, BC V2Y 1R7
T: 604-514-5305 // F: 604-514-5308
patrick.choquette@raymondjames.ca // www.maxwealthfinancial.ca

RAYMOND JAMES®

This document has been prepared by Janet Mason, Vice President, Senior Trusts & Estates Counsel, Private Client Solutions, Raymond James Ltd. ("RJL") and is solely for informational purposes. It is furnished on the basis and understanding that RJL is under no liability whatsoever in respect of the information provided. Statistics, factual data and other information are from sources RJL believes to be reliable but their accuracy cannot be guaranteed and is subject to change. RJL, its employees and financial advisors are not estate or tax planners and do not provide legal or tax advice. The comments and information contained in this document cannot be relied upon to replace specific legal or tax advice. Individuals should always consult their own lawyer and/or qualified tax professional regarding their specific situation