

BMO NESBITT BURNS

A Guide to Granting Powers of Attorney



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Introduction

While a Will ensures that your assets are dealt with according to your wishes at death, only a Continuing (or Enduring) Power of Attorney for property can provide for the proper management of your property and financial affairs during your lifetime, should you become mentally incapable or have to be absent for an extended period of time. Accordingly, a Power of Attorney is an important part of a complete financial plan.

Laws differ by province and are subject to change

In Canada the laws of the province of a person's residence apply to Powers of Attorney. However, in some cases the laws of the place where property is located, particularly real estate, may apply. In addition, laws are always subject to change. For these reasons it is particularly important to receive personalized professional advice in the preparation and use of Powers of Attorney.

Because this guide is intended to apply to all provinces, we will refer to a Power of Attorney for property which survives your incapacity as a Continuing or Enduring Power of Attorney. The terms "Power of Attorney", "donor" and "attorney" should be read to include "Mandate", "mandator" and "mandatary", which are the Quebec equivalents.

What is a Continuing Power of Attorney?

A Continuing (or Enduring) Power of Attorney is a legal vehicle by which you can ensure your affairs will be managed efficiently in the event you lose the capacity to manage them yourself.

A Continuing Power of Attorney is a document in which you appoint another person or trust company (the attorney) as your substitute decision maker and confer authority on that person or corporation to make financial decisions and to act on your behalf. A general Continuing Power of Attorney authorizes all your property, but it is possible to limit that scope.

- You may restrict the Continuing Power of Attorney to specific assets or transactions such as bank accounts, securities, specified business dealings, or sale of particular real property.
 - The Continuing Power of Attorney may also be limited in time. For example, you might authorize your attorney to deal with only some of your property for a specific period such as while you are out of the country.
 - In all provinces, a Continuing Power of Attorney can authorize the attorney to continue acting on your behalf should you become unable to manage your own affairs. In Ontario, this is called a Continuing Power of Attorney for Property whereas in other provinces, it is called a Durable or Enduring Power of Attorney. In British Columbia, since September 2001, this power may be conferred under a Representation
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Agreement. Although most provinces have laws that are similar governing Powers of Attorney, there are provincial differences.

- In Quebec a Power of Attorney may take effect immediately. However, if it is to continue after the donor is no longer capable of managing his or her own affairs, a court must determine that the donor is no longer capable and ratify the Power of Attorney to continue. Such a Power of Attorney in Quebec is called a Mandate in Anticipation of Incapacity.

Why a Continuing Power of Attorney is Important

For the security and peace of mind that it provides, it is recommended that every adult should have a Continuing Power of Attorney. Being without a Continuing Power of Attorney could leave you vulnerable. Some common misconceptions regarding Powers of Attorney may be holding you back from making the appropriate arrangements for one. This guide addresses those misconceptions and shows why it is important to have a valid Continuing Power of Attorney in place.

Scenario

Susan knew she would be impossible to reach for the coming six months as she would be in Borneo. If a decision was needed on her investment portfolio, she wanted someone she trusted as her representative.

She granted a limited Continuing Power of Attorney to her lawyer.

Family members are not automatically authorized

One misconception is that, in the event of a loss of capacity, a family member can automatically deal with your property. If you have not granted a Continuing Power of Attorney to a family member, he or she will not be authorized to manage your property without obtaining a court order or the approval of a provincial government official. This can be costly and time-consuming, and the family member may be denied the authority to act for reasons which you may not consider important. The court could also appoint someone you may not approve of to manage your property or impose conditions regarding the management of your property with which you might not agree.

With joint property, a spouse or other joint owners can only deal with some assets

Some people rely on joint tenancy as a tool for incapacity planning. This is based on the misconception that if all of your property is held jointly with your spouse, your spouse will be able to manage every aspect of your financial affairs if you lose capacity. This is not entirely true. Your spouse may be able to deal with joint bank accounts, but would not be able to sell or mortgage a jointly-owned home or other real property. These transactions require the signature of all joint owners or, if one of them is incapable, the signature of his or her attorney. If there is no attorney, the court may appoint a representative.

Incapacity can come at any time

A loss of mental capacity can occur suddenly, so it is important to make arrangements for a Continuing Power of Attorney while you are able.

Choosing the Right Attorney

Grant your Continuing Power of Attorney to whomever you trust will do the job well. You may choose anyone you think is appropriate, as long as that person is a mentally capable adult and trustworthy. You may choose a trust company, if you want privacy and independence. You may also appoint multiple attorneys if you wish to do so.

Know the requirements

To ensure that you select the right attorney, it is wise to consider the nature and complexity of the tasks they may have to perform. Once you know what may be required of your attorney(s), you should choose someone who will be able to deal with those matters personally, or a group of attorneys who will be able to work together. In addition, each attorney should be someone you trust to manage your property prudently and in your best interests, taking into consideration any dependants you may have.

Select someone you trust

With these criteria in mind, you have many options from which to choose. Your spouse, adult children, lawyer, accountant, another family member or friend may be appropriate, depending on your circumstances.

Scenario

A severe car accident left Lorraine in a coma for three months. Because she had granted a Continuing Power of Attorney to her husband, he was able to manage her financial affairs until she recovered her full health without requiring court or government intervention.

If named as an Executor in your Will, a trust company, such as BMO Trust Company, may be a good choice for your attorney as well, especially if you require specialized expertise or if there is no suitable individual to act due to complicated family dynamics.

Even if you decide that your spouse is the best choice to act as your attorney, it is often wise to appoint someone else to act either along with or as an alternate to your spouse. There are several reasons for this:

- You and your spouse may travel out of the country together.
- You and your spouse may be involved in an accident together.
- Your spouse may become incapable or die while acting under the Power of Attorney on your behalf; or
- Your spouse may not be familiar with making investment decisions or the workings of your business.

Below is a sampling of the agencies or individuals your attorney(s) may be required to deal with when managing your financial affairs, depending on the nature of your property.

- Investment Advisors
- Canada Revenue Agency
- Banks
- Accountants
- Directors of your corporation
- Canada or Quebec Pension Plan
- Health/Disability Insurers
- Old Age Security
- Lawyers
- Your family

Make special arrangements for a business

Special consideration may be required if you have a business. In some instances, one Continuing Power of Attorney under which your attorney(s) will manage both your business and personal finances may be appropriate. However, your business may be large and complex, and require someone familiar with the business to manage it. The person appropriate for this role may not be suitable to manage your personal finances. In these circumstances, you may wish to have two simultaneous limited Continuing Powers of Attorney. One document names an attorney to manage your business, and the other names an attorney to manage your personal financial affairs and non-business property. With multiple Continuing Powers of Attorney, care must be taken to ensure one does not revoke the other.

What the Continuing Power of Attorney Should State

It is important to provide thorough and clear instructions to your attorney. Subject to the laws applicable in the province where you live, the nature of your property, and your circumstances, your Continuing Power of Attorney may address any of the following:

- Appointment of your attorney(s) and any alternates. In most provinces, if you appoint more than one attorney, they all act jointly unless you specify that they may act severally or by majority (this does not apply in Manitoba).
 - Management of your property to the same extent you could if capable, subject to any limitations imposed by you in the document.
 - Effective time of application.
 - Continued financial assistance for non-dependants during your incapacity (e.g. school fees for grandchildren).
 - Gifts to family, friends or charity, if this has been your choice in the past.
 - Use, maintenance, sale of, or borrowing against particular property, such as a cottage.
 - Compensation to the attorneys from your property for their efforts.
 - Retaining agents to assist the attorneys with their administrative duties.
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- Gift provisions of your Continuing Power of Attorney may be made conditional upon there being funds available in excess of the needs of you, your spouse, and any other dependants.

Please note that an attorney acting under a Continuing Power of Attorney, cannot, in most provinces, write or re-write your Will, or designate or change beneficiaries under your life insurance policies and registered plans.

Power of Attorney for Personal Care (the “Living Will”)

Most provinces allow you to give directions concerning your personal care and medical treatment in the event you lose the capacity to make the necessary decisions for yourself. Depending upon the province in which you live, this direction may be either a Power of Attorney for Personal Care or a Living Will. Under a Power of Attorney for Personal Care, you appoint an attorney or attorneys to make medical decisions for you, subject to any instructions you have given. Typically, this document is effective only to the extent that you lose cognitive capacity and are unable to make personal care decisions.

Scenario

With the news that he had a debilitating disease, Tyler knew that eventually he would need someone to manage his medical care and his property.

Granting a Continuing Power of Attorney and Power of Attorney for Personal Care to his wife with his two adult children and his brother, as alternates, has contributed to Tyler's peace of mind.

In a Living Will (sometimes called an advance medical directive, health care directive or mandate), you do not necessarily empower someone to make these decisions for you. Instead, you specify your medical instructions in the Living Will, with as much clarity as possible. Some provinces allow you to name a proxy to carry out these instructions in the event you lose capacity, or to make decisions that are not addressed in the Living Will.

Your Continuing Power of Attorney and your Power of Attorney for Personal Care or Living Will should be separate documents, even though you may choose the same attorney or proxy for both. Besides possibly naming different attorneys and having different purposes, the individuals and institutions who need to be shown the two documents will be quite different. Separate documents ensure better protection of your privacy and efficient enforceability of your intentions.

In Quebec, a Mandate in Anticipation of Incapacity may be given for financial and property matters and for personal care in the same document. Such a document may name two different persons to act as mandatary for administration of property and mandatary for protection of the person, or the same mandatary to perform both functions.

Time Frame for Your Continuing Power of Attorney

One of the things that may inhibit many people from granting a Continuing Power of Attorney is their concern over when it takes effect and when it ceases. Many people wish their Continuing Power of Attorney to be acted upon only in the event they lose capacity. However, it is wise for your Continuing Power of Attorney to be effective immediately upon signing it and continue to be in effect in the event that you lose capacity. There are practical reasons for this. If your Continuing Power of Attorney comes into effect only when you have lost capacity:

- Your attorneys will have to establish your lack of cognitive capacity which may require court intervention. This may incur costs and delays.
 - Some of the privacy afforded by having a Continuing Power of Attorney may be lost.
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- Attorneys who may be happy to act on the basis that they are “helping you out”, may be unwilling to take the step of having the court declare you incapable.
- The attorneys will have no authority to act under the Continuing Power of Attorney if you are having physical difficulty (rather than cognitive difficulty) dealing with your financial affairs; if you lose sufficient interest to manage some or all of your property, or if you are out of the country.

If you prefer that your Continuing Power of Attorney apply only in the event of a loss of capacity, you may wish to specify a method, preferably one which does not involve the court, by which your loss of capacity can be established. The Continuing Power of Attorney may state that one or more medical certificates signed by qualified doctors will constitute sufficient evidence of your loss of capacity. However, there may be disadvantages to this method, one of which is that banks, investment dealers and others who hold your property may question the attorneys’ authority to act and require evidence that you have not regained capacity subsequently.

While there are practical benefits to having the Continuing Power of Attorney effective immediately, there is a risk. It is a matter of trust between you and the attorneys that they will not act until you have lost capacity or until you have instructed them to do so.

How BMO Nesbitt Burns Can Help

Your BMO Nesbitt Burns Investment Advisor can assist you in finding the right professional to help you prepare your Continuing Power of Attorney as part of a complete estate plan.

If named as Executor of your Will, BMO Trust Company can also act as the attorney, or one of the attorneys, under your Continuing Power of Attorney.

BMO Nesbitt Burns – A Profile

As one of Canada's leading investment firms, BMO Nesbitt Burns Inc. has an established reputation within financial services.

Since its origins in 1912, the firm has been committed to providing clients with advice and services of the highest standards.

The Private Client Division of BMO Nesbitt Burns is focused on meeting the wealth management needs of individual clients.

By understanding your unique needs and circumstances, you and your Investment Advisor can work together to develop and implement a customized strategy tailored to meet your goals.

Your Investment Advisor can draw upon the full depth and breadth of the BMO Financial Group of Companies to provide you with an integrated and multi-disciplinary wealth management solution. This includes all aspects of managing, protecting and transferring wealth, including investments, insurance, tax efficiency, estate planning, retirement planning, cash management, planned giving, trusts and Wills.

The comments included in this publication are not intended to be a definitive analysis of tax law or trust and estate law. The comments contained herein are general in nature and professional advice regarding an individual's particular tax position should be obtained in respect of any person's specific circumstances.

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M26010 07/11-291

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