Wealth Management

the Navigator

INVESTMENT, TAX AND LIFESTYLE PERSPECTIVES FROM RBC WEALTH MANAGEMENT SERVICES

Power of Attorney for financial and property matters – Common-law provinces only

Please contact us for more information about the topics discussed in this article.

A Power of Attorney (POA) is an essential component of your financial and estate plan. A POA is a versatile document that can be used to assist you in a variety of ways. This article is intended to provide general information on issues relating to the preparation and use of, as well as the risks associated with, POAs for financial and property matters in common-law provinces and does not apply to residents of Quebec.

What is a POA?

A POA is a legal document whereby one person, commonly referred to as a donor, gives another person(s), referred to as the attorney(s), the power and authority to act on the donor's behalf. In performing their duties under a POA, the attorney(s) must always adhere to the fundamental principle that they are a fiduciary and must act in the best interests of the donor.

A POA for property and financial matters is used to grant the attorney(s) authority to make decisions about financial and property matters. A separate legal document may be used to make personal care decisions, generally referred to as a POA for personal care. In some jurisdictions, you can execute one document which will contain your authority for an attorney to act on your behalf in relation to financial and property matters as well as personal care matters. This article only focuses on some of the more relevant issues relating to POAs for financial and property matters.

Creating a POA

There are multiple ways to create a POA. Typically, individuals would have a qualified legal advisor prepare a POA. You may also purchase a do-it-yourself "POA kit" which will provide you with a basic fillable form, while some provincial governments may provide a free POA form. These do-it-yourself kits are often very basic and if they are not filled in correctly, or executed correctly, they can be

invalid. Alternatively, financial institutions oftentimes have standard form POAs to facilitate the appointment of an attorney(s) to make sure there is no gap in control over your accounts.

We strongly recommend that you have a qualified legal advisor prepare your POA with the expectation that they will draft a POA which contains the clauses necessary to enable your attorney(s) to effectively carry out your wishes during your lifetime. Generally, a POA must meet certain statutory requirements to be valid. These requirements may differ from one jurisdiction to another. The general requirements for the creation of a POA are:

- It should be in writing and signed by the donor in the presence of one or more witnesses depending on the statutory requirements of the jurisdiction where they live; and
- The donor should have reached the age of majority in the jurisdiction where they live and have the requisite mental capacity.

Several jurisdictions have limitations regarding witnesses. Generally, the following individuals should not witness the signing of a POA:

- The attorney(s) or the spouse of the attorney(s);
- The donor’s spouse or common-law partner; and
- A child of the donor.

Other restrictions regarding witnesses may apply depending on the jurisdiction where you reside or where your property is located.

Although there are certain form requirements for a POA, a donor does have flexibility in prearranging their financial plan and providing instruction to their attorney(s). A common clause found in many POAs gives the attorney(s) power to do anything that the donor could do if capable. Although this may be the intent of the donor, the operation of certain laws may limit the attorney’s authority and powers. For example, your attorney(s) may not be able to designate or change an existing designation on registered products such as a Registered Retirement Savings Plan or Tax-Free Savings Account and may not execute a Will on your behalf. Moreover, they cannot delegate their authority unless specifically provided for in the POA or expressly allowed by statute, although an attorney is free to retain professional assistance in discharging their duties.

In addition, you may wish to ensure that your POA for property includes a clause providing that the power granted to an attorney will continue notwithstanding the donor’s loss of mental capacity. A POA that contains this clause is generally known as an “enduring” or “continuing” POA. In the absence of such a clause, the power granted to an attorney over property is extinguished if the donor loses mental capacity. This can be a critical issue as it is precisely at the time that you demonstrate mental incapacity that you will need an effective POA authorizing someone to act on your behalf.

When does a POA become effective?

There are two major elements you have control over when creating a POA: the breadth of authority given to the attorney(s) and when the POA will come into effect.

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Typically, POAs are drafted to allow the attorney(s) to act for the donor after their incapacity (referred to as an “enduring POA”). Alternatively, POAs can be drafted to have a limited duration or scope, which will limit the authority of the attorney(s) to a specific task or transaction and for a limited time after which the POA would cease to be valid (commonly referred to as a “limited scope POA”). Limited scope POAs are often used to deal with property in cases of long term absences (i.e. selling or purchasing real property when on vacation abroad). At some point, you’ll most likely want to ensure you have an unrestricted enduring POA in place to make sure all of your assets are protected in the event of any future incapacity.

Once you decide the breadth of authority you would like to give your attorney(s) you must then decide when that power will come into effect.

A POA will take effect immediately upon being signed and witnessed, unless otherwise stated in the document. That being said, although your POA may be effective immediately, your instructions and decisions will take precedence over those of the attorney(s) while you are mentally capable.

You may prefer to have the POA only take effect in the future when a specific event occurs (commonly referred to as a “springing POA”). If you wish to have a springing POA, you must specifically state what the triggering event will be within the document. For example, a springing event could be if you are found to be legally incapable of managing your own finances, or if you should become sufficiently physically impaired. It is important when drafting a springing POA to ensure there is no ambiguity in defining the springing event or it could create confusion as

to when the POA will be effective. It may also be possible to control when the document is used by setting out your wishes (for instance, you only want the POA to be used in the event two physicians confirm you are incapable of managing your property) in a separate document to be held alongside the POA, preferably by a trusted party (such as your lawyer or trust company).

What is capacity?

It is important to understand the concept of 'capacity'. This can be broadly defined as an individual's ability to make decisions, including investment decisions, and to realize what the outcome of those decisions will be. If it becomes necessary to determine your capacity, a medical opinion or capacity assessment will usually be involved. Generally, a letter, signed by a licensed medical doctor, containing a statement that you are no longer able to make your own decisions regarding your financial affairs or your property will be sufficient to support such determination. However, a donor can stipulate how capacity should be assessed by identifying the doctor or organization responsible for determining capacity, as well as stipulate an appropriate dispute resolution mechanism in case a dispute arises between attorneys. In contentious circumstances, a formal capacity assessment may be required.

Capacity is a critical concept. You must have capacity at the time you execute your POA for the document to be valid. If, on a later date, it is determined that you no longer have capacity, the authority given in your POA will be extinguished unless you have prepared an enduring POA.

If professional advisors suspect that your ability to make decisions has diminished they may refuse to act on your instructions. Professional advisors may seek a determination of competence from the person or organization you specified in your POA.

Appointment of attorney(s)

Singular versus multiple attorneys

In creating your POA, consider how many attorneys you wish to appoint and who they will be. You may wish to appoint only one attorney and, in such a case, consideration should be given to naming an alternate attorney(s) to replace the original attorney if they are unable to act. An alternate attorney is not required where you've appointed a trust company.

If you wish to appoint more than one attorney, it is important to understand the different types of appointments you can make based on the governing law of the jurisdiction where you reside. Generally, if you appoint more than one attorney they are required to act jointly unless the terms of your POA or the relevant statute provides otherwise. In some jurisdictions, attorneys can be appointed to act jointly and separately, or jointly and severally, which means that your attorneys have the authority to act together but any one of them may also act alone. In other jurisdictions, attorneys can be appointed to act successively, which means that the attorneys are required to act alone, and in the order in which their names appear on the POA.

> When appointing an attorney(s) consider whether the individual(s) you choose live(s) in your jurisdiction or in a different jurisdiction.

Whether you decide to give your attorneys the flexibility to carry out their duties separately or to restrict their power by only allowing them to act together, consider how comfortable you feel knowing that signatures from only one or all attorneys will be required to make decisions on your behalf. You may also wish to consider the practicality of such an arrangement, depending on the nature and frequency of the decisions that will need to be made that cannot wait for multiple signatures to be provided. Should the attorneys be unable to come to a consensus, you are able to identify a dispute resolution mechanism to ensure decision making is not kept at a standstill.

Residency of your attorney(s)

When appointing an attorney(s) consider whether the individual(s) you choose live(s) in your jurisdiction or in a different jurisdiction. Your attorney(s) may face practical challenges in carrying out their duties if they live at a distance and there may also be compliance issues relating to their ability to give instructions to your financial advisors. For example, a financial advisor in Ontario, who is not registered under U.S. securities laws, may not be authorized to give investment advice to or take investment direction from an attorney who is a U.S. resident. In such a case, your attorney(s) may not be able to act on your behalf at a time when you are, for example, incapacitated.

Consider the practical issues that will enable your attorney(s) to perform their duties if you wish to appoint an attorney(s) who lives in a different jurisdiction from you. It may be practical to appoint an attorney(s) who lives locally to act jointly and severally with the 'long-distance' attorney(s). This may help ensure that all tasks can be carried out efficiently.

Appointing a corporate fiduciary to act as attorney

A trust company, like RBC Royal Trust, can help by acting as the attorney, or by providing assistance to the named attorney, to manage your assets. Some of the advantages

of a corporate fiduciary include neutrality, availability, expertise, and continuity. Appointing a corporate fiduciary can help to ensure the administration of your assets is done in accordance with the relevant laws and may help to mitigate costly litigation. If you have questions about who to appoint as an attorney for property or your responsibilities when appointed, please speak to your RBC advisor to find out more about the services provided by RBC Royal Trust.

Compensation

Your attorney(s) may receive compensation for acting on your behalf. However, they should only be compensated if the POA provides for this or to the extent that it is permitted by applicable statutes or directed by the courts.

In the case of a corporate fiduciary, fees are generally set at the time the POA is drafted, often by way of a fee schedule incorporated into the POA. Similarly if your attorney is professionally qualified as, for example, a lawyer or accountant, and may provide you with services in that capacity, the POA should specify the appropriate compensation for acting in that professional capacity. The POA should also state whether compensation is to be paid for performing both professional and non-professional services.

The standard of care that is required of an attorney may be dictated by whether or not they are compensated for their services. An attorney who does not receive compensation for their services is expected to demonstrate the skill, care and diligence that an ordinarily prudent person would in managing their own affairs. An attorney who is compensated for their services may be subject to a higher standard. The attorney may be expected to demonstrate the standard of the care, skill and judgment which is required of a person in the business of managing the property of others. An attorney should consult with a qualified legal advisor to fully understand what obligations they have and what is expected of them when providing services.

Multiple POAs

Generally, your POA will cover the property situated in the jurisdiction where you live. If you have property in other jurisdictions, it's important to know that the rules governing the requisite formalities that constitute a valid POA may differ from jurisdiction to jurisdiction. As a result, you may wish to consider executing a POA for each jurisdiction where your assets may be situated.

In addition, generally, a new POA may revoke an existing POA that pertains to the same subject matter, except in cases where the POA expressly provides for the existence of multiple POAs. Therefore, when creating multiple POAs, it is important to ensure that one does not inadvertently revoke the other and includes language that provides for the existence of multiple POAs.

> Your attorney(s) may receive compensation for acting on your behalf.

Termination of POA

As long as you have legal capacity, you have the right to revoke your POA at any time. To revoke the attorney appointment, you would need to send a written notice to the attorney(s) and to all parties concerned. This is important because, at law, a third party (which could be an individual or an organization), is entitled to rely on the authority of the attorney(s) until they receive notice otherwise. For example, if your attorney is completing transactions that are not in your best interest, you (or your estate) may not have any recourse against the third party for any transactions that occurred prior to the written notice being sent to the third party to revoke the POA.

Your POA may terminate without your instruction in a number of circumstances. Generally, a POA will terminate should you become incapacitated (refer to earlier discussion regarding 'enduring' or "continuing' POA) or upon your death. At death, your Will provides guidance regarding the management of your affairs related to financial and property matters.

A POA will also terminate should your attorney(s) become legally incapacitated, die, is declared bankrupt, or should your attorney(s) resign and you haven't named more than one attorney or there is no substitute attorney, or when a limited scope POA is concluded. In order to ensure that your POA does not prematurely terminate due to an unforeseen issue with your attorney, it would be prudent to appoint a substitute attorney(s).

Note that in most jurisdictions, a POA in favour of your spouse or common-law partner does not automatically terminate on separation or divorce unless it is revoked.

Duties and powers of the attorney(s)

The attorney(s) must always adhere to the fundamental principle that they are acting in a fiduciary capacity and their actions must be in the best interests of the donor. Other common-law principles also apply to the fiduciary relationship that exists between you and your attorney. These are implied by law and do not need to be expressly included in the POA. For example, common-law requires that the attorney avoids conflicts of interest and acts in good faith. Bear this in mind when deciding the terms on

which to grant a POA and the contingencies for which you wish to empower your attorney(s).

If you wish your attorney(s) to have the ability or authority to perform any of the following tasks, you generally need to include an express provision in your POA that authorizes them to:

- Delegate investment powers to a portfolio manager or investment counselor;
- Make gifts or loans to third parties including charities;
- Implement estate planning strategies such as effecting an estate freeze and settling an inter vivos trust; and
- Replicating a beneficiary designation on RRSPs, RRIFs, TFSAs and/or insurance policies.

When you prepare your POA, consider the range of tasks that you may want your attorney(s) to perform. There are limits to the powers you can give to your attorney(s) and some powers can only be given to your attorney(s) if you expressly include them in the POA itself. It is also important to think about making the POA as flexible as necessary to ensure that your attorney(s) is able to deal with unknown future circumstances.

Delegation of investment powers or decisions

There is no common-law rule that authorizes an attorney(s) to delegate their authority to another person. In certain jurisdictions, the power to delegate investment powers is mandated within statutes. While in other jurisdictions you would need to include specific language within the POA to authorize this power, which could include the power to appoint more than one advisor or change advisors in the event that an advisor moves, retires, or dies.

This is important to keep in mind if you would like to open a discretionary account. A discretionary account is an investment account under which the discretionary authority is entirely delegated to an advisor. If you, as the donor of the POA, opened a discretionary account prior to becoming incapacitated, the discretionary arrangement can continue as the attorney(s) can take your place.

If you wish to ensure your attorney(s) has the power to delegate their investment powers to a portfolio manager or investment counselor (i.e., a discretionary investment management account), you can provide express powers in your POA authorizing your attorney(s) to do so. If you wish that the authority extends to a discretionary investment management account that uses third party investment managers, this will require an additional level of delegation, sometimes called 'sub-delegation'.

When your attorney opens a new discretionary account on your behalf, they may be required to develop an Investment Policy Statement (IPS), on your behalf, based on a number of factors, including your investment preferences, risk tolerance and time horizon. It may be necessary to include the expressed power to develop an IPS in your POA.

Stepping back, before you decide whether to include a power to delegate or sub-delegate in your POA, your first decision should be whether investing in a discretionary account will be right for you. Your attorney must always exercise their powers in accordance with the instructions set out in your POA and with your best interests in mind, so give some thought to how you would like your attorney to make decisions on your behalf.

Generally, your attorney may only make gifts or loans to a third party if this power is expressly provided for in the POA and if the gifts or loans made are based on your previous practice and intentions.

Making gifts or loans to third parties

Generally, your attorney may only make gifts or loans to a third party if this power is expressly provided for in the POA and if the gifts or loans made are based on your previous practice and intentions. Certain jurisdictions do not permit an attorney to make gifts. If you wish to restrict your attorney's ability to make gifts or loans, include appropriate wording in your POA. In some jurisdictions, legislation prescribes the total value of all gifts, loans and charitable gifts that can be made by your attorney in a year without express authorization in the POA and/or court authority.

Your interest in a joint account

If you have assets in a joint account and have appointed someone other than the joint account holder as your attorney, there could be a situation where both the joint holder and your attorney are authorized to make decisions about the account. It is important to ensure that all parties involved are aware of your intentions and how the account will be maintained once the POA comes into effect. In cases where you have appointed your joint account holder as your attorney under your POA, it would also be prudent to discuss the maintenance of the account. This will help to ensure that your interests are considered first and foremost should you become incapacitated.

Implementing estate planning strategies such as effecting an estate freeze or settling an inter vivos trust

You can give your attorney(s) the authority to make certain estate planning decisions on your behalf, such

as settling an inter vivos trust or implementing an estate freeze, by including these powers in your POA. Such powers could allow your attorney(s) to effect an estate plan on your behalf, for example, to minimize income or probate taxes at death.

As an attorney(s) is acting in a fiduciary capacity, an attorney(s) needs to ensure that the interests of the donor are protected and that the donor will not be deprived of funds needed for their care. Before engaging in any estate planning, the attorney(s) should consider whether the strategy benefits the donor, reduces the future or present value of the donor's estate, allows the donor to resume control over the property if they regain capacity, interferes with the donor's property to the least possible extent and is consistent with the donor's Will.

If the strategy employed by the attorney(s) is challenged and/or reviewed by the court, it may not receive court approval if it will deplete the deceased's estate or benefits someone other than the donor.

Even if the POA provides the attorney(s) with the authority to engage in estate planning, it is wise for the attorney(s) to seek court approval before doing so.

Making or changing beneficiary designations on RRSPs, RRIFs, TFSAs and/or insurance policies

An attorney(s) is generally prohibited from making a beneficiary designation or changing an existing designation on behalf of a donor since that is considered to be a testamentary disposition and exceeds the authority of an attorney. However, you may be able to include powers in your POA to confirm the ability of your attorney to designate the same beneficiary when your RRSP converts to a RRIF. You should consult with a qualified legal advisor to determine what powers your attorney may have in relation to beneficiary designations under your governing provincial or territorial legislation.

Corporate issues and considerations

If you have a corporation, it's important to understand that a POA gives authority to your attorney(s) to step into your shoes as the owner of any shares, and allows them to sell, transfer or vote on the shares on your behalf. This may have certain unanticipated results. So, you may want to consider the following matters when creating your POA.

Acting as a director

A POA does not give your attorney authority to step into your shoes and act as a director of a corporation. To become a director and act in that capacity, your attorney, in their capacity as a shareholder under the POA, must elect themselves to be the director. If you are not the sole shareholder of the corporation, your attorney may need the consent of other shareholders to be elected as director.

If you have a corporation, it's important to understand that a POA gives authority to your attorney(s) to step into your shoes as the owner of any shares, and allows them to sell, transfer or vote on the shares on your behalf.

Association issues and considerations

Once your POA is active, your attorney(s) will have the ability to exercise voting rights over your corporate shareholdings. The CRA has stated that when an attorney(s) has the ability to exercise voting rights over the donor's shares, the attorney(s) will be deemed to own those shares. If your attorney(s) controls their own corporation at any time while the POA is invoked, then the CRA may consider your corporation and the attorney(s)'s corporation to be associated.

The association of two or more corporations may have unintended tax consequences. For example, the corporations may be required to share the small business limit potentially limiting access to the lower corporate tax rates on active business income earned in a corporation below the small business limit. Therefore, it is important to ensure that the appointment of your attorney(s) does not lead to an unintended association of your corporation with a corporation controlled by the attorney(s).

Operational issues and considerations

Although it is reasonable to assume that you would not intentionally appoint an attorney(s) who would act in a manner contrary to your best interests, this may occur for a number of reasons. An attorney(s) may abuse their powers inadvertently because the attorney(s) does not understand the nature of their obligations or because the attorney(s) become(s) involved in situations where there is a conflict of interest between you and the attorney(s). There are also, unfortunately, situations where the attorney(s) willfully commits a breach of fiduciary duty. In cases of the attorney(s) misappropriating assets that are entrusted to them by the donor, there may be criminal charges laid against the attorney(s).

A carefully drafted POA can help protect your interests and help ensure that your instructions are carried out if you are incapacitated (assuming an 'enduring' or 'continuing' POA) or need someone to act on your behalf. Your attorney(s) must keep in mind the principle that they are a fiduciary and must exercise their power in your best interests. If the financial institution dealing with your attorney(s) is concerned that the attorney(s) is not acting in your best interests, it may ask you, rather than the

attorney, assuming you are legally competent, to sign off on withdrawals from your accounts, or other transactions.

Your attorney(s) should also be aware that when they present a POA to a financial institution, the financial institution may make reasonable enquiries to determine whether the POA is valid (i.e., not fraudulent or invalid), and authenticate the identity of the attorney(s). As a result of these enquiries, the financial institution may, initially, refuse to facilitate certain transactions requested by the attorney(s). These enquiries are important for your protection and ensure that the financial institution is not negligent as financial institutions owe a duty of care to their clients.

In light of the above comments, you and your attorney(s) should know that, in general, unless the POA expressly gives your attorney(s) the power to do something, or authority is provided by a court order, a financial institution may refuse to allow your attorney(s) to proceed with some tasks.

Working with RBC

As a client of RBC, you may have several relationships depending on your personal financial situation (e.g., Royal Bank of Canada, RBC Dominion Securities, RBC Philips Hager and North Investment Counsel, RBC Insurance). While all these are considered affiliates of RBC, it is important to remember that they are distinct and separate legal entities and are governed by different regulatory bodies.

Your attorney will need to provide a notarized copy of a POA to each legal entity within the RBC Financial Group that your attorney needs to deal with. You may also wish to include direction in your POA as to whether your attorney has authority to terminate your relationship with your RBC advisor or transfer your assets to another financial institution. If you do not wish your POA to have these broad powers, a qualified legal advisor can advise of the appropriate wording to include in your POA to restrict your attorney's ability to make certain decisions.

Your RBC advisor is aware that you are the client, even when they are receiving instructions from the attorney you have appointed. Your RBC advisor will only be able to follow instructions provided by your attorney(s) that are in accordance with the authority you provided for in your POA and are in your best interests.

This article may contain strategies, not all of which will apply to your particular financial circumstances. The information in this article is not intended to provide legal, tax or insurance advice. To ensure that your own circumstances have been properly considered and that action is taken based on the latest information available, you should obtain professional advice from a qualified tax, legal and/or insurance advisor before acting on any of the information in this article.

You and your attorney(s) should know that, in general, unless the POA expressly gives your attorney(s) the power to do something, or authority is provided by a court order, a financial institution may refuse to allow your attorney(s) to proceed with some tasks.

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