



PLANNING FOR INCAPACITY

Financial and Legal Considerations

An aging society coupled with a surge in the incidence of dementia is driving an extraordinary growth in a specialized aspect of financial and legal planning: powers of attorney (POAs). Leanne Kaufman, head of RBC Estate and Trust Services, says that her firm saw a 250% increase in 2017 over the previous year in business related to POAs. But she believes that people are still not giving POAs enough consideration.

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“THERE'S LOTS OF ATTENTION REGARDING THE IMPORTANCE OF HAVING A WILL, BUT NOT THE SAME AMOUNT OF FOCUS ON HAVING A POWER OF ATTORNEY,”

said Ms. Kaufman in an interview with Mind Over Matter.® “To me, in some ways the power of attorney is more important because it impacts you while still alive.” →

Although we are now living longer than ever before, record numbers of individuals are experiencing cognitive decline and dementia. As of 2016, over half a million Canadians were living with dementia, and this number is expected to nearly double by 2031. Consequently, a significant segment of the population may lack (or are gradually losing) the ability to make decisions for themselves. As a person's mental capacity declines, his or her decision-making will increasingly involve others, such as family members, substitute decision-makers, and health-care professionals.

MAKING DECISIONS ON ANOTHER PERSON'S BEHALF CAN BE DIFFICULT AND HIGHLY STRESSFUL, ESPECIALLY WHEN THE VALUES AND WISHES OF THE INDIVIDUAL WITH DEMENTIA ARE UNKNOWN OR IMPOSSIBLE TO FOLLOW.

Ms. Kaufman gives regular presentations across Canada on this topic, providing audiences with practical advice and strategies for putting one's affairs in order. She stresses the importance of making arrangements for a POA for both the donor (i.e. the person who is granting the power of attorney) and his or her loved ones. She advises that individuals must carefully consider whom to appoint as their POA. In some cases, the appropriate choice is a trust company. Such companies are sometimes preferred to individuals as they are able to dispense their services impartially and are held to a standard of professional accountability.

"For every financial aspect of your life, this person is stepping into your shoes," she says. Accordingly, the donee (i.e. the person who is receiving the power of attorney) must not only be someone who the donor trusts, but also someone who has the necessary acumen to oversee his or her affairs. For instance, if the donor holds substantial investments, he or she should not select someone who is unfamiliar with those matters. It is also inadvisable to select someone who does not live within the same jurisdiction as the donor. If the donee resides in the United States, he or she would be constrained by regulation from overseeing the donor's Canadian-based investments.

Kimberly Whaley, a Toronto-based lawyer who specializes in the area of estate, trusts, capacity, and power of attorney litigation, said that her business is booming, sadly because more and more cases of abuse are surfacing.

"What we're seeing a lot of now, which we didn't used to see, is a lot of disputes over property of the mom or dad during their lifetimes," said Ms. Whaley. "We used to see them more after death, when one party learns that mom or dad was coerced into changing a will document."

Ms. Whaley noted that she has witnessed a growth in predatory practices targeting vulnerable individuals. Sometimes a so-called new friend will convince a person who is in the early stages of dementia to change a POA document, handing over financial responsibility to someone whose only motivation is exploitation. In Ontario, it is possible to print off a standard POA form from the Ministry of the Attorney General's website (and therefore individuals do not need a lawyer to prepare the POA document for them). This means that there are more cases of people with multiple, conflicting POA documents, which inevitably are contested in court.

"It's more frequent than you know. That's the basis of my practice now," said Ms. Whaley.

A few years ago, she dealt with a heartbreaking case. She represented a lawyer who was appointed as a donee for his mother. His sister had responsibility for the mother's personal care. A dispute arose between the siblings over whether the mother should be placed in a long-term care facility - a matter that ended up in a protracted legal battle with all of the mother's assets being frozen by the court. Every time that a payment needed to be made for anything, the siblings first had to go to court to obtain an order. This process dragged on for four years, draining the assets of her client's mother, and was never resolved because the mother passed away before the matter could be settled.

"The system is not geared to deal with these kinds of disputes. It's just untenable because the courts are backlogged dealing with them," said Ms. Whaley.

It is not only warring family members causing problems. Ms. Whaley is also regularly battling financial institutions over POA matters.

A BANK, IF IT SUSPECTS ABUSE, HAS THE ABILITY TO FREEZE A PERSON'S ASSETS WITH OR WITHOUT NOTICE.

Ms. Whaley has even encountered cases where a financial institution questions the validity of the POA and demands a capacity assessment of the client. Unfreezing the assets, even with a legitimate POA, can be a complicated and time-consuming legal process.

"My clients get angry. I get upset. Jumping through all the hoops, it's costly. Why should a client have to hire a lawyer to get his or her money?"

Ms. Whaley does have some sympathy for the banks, understanding that they feel pressure to protect their clients from fraud. Nevertheless, she believes that financial institutions are frequently going too far.

"We're all struggling with this. There's not a right answer...yet."

In March 2017, the Law Commission of Ontario (LCO) - an independent body that recommends law reform - released its report about POA documents and their potential for abuse and misuse. The report was the result of nearly two years of research and consultation by the LCO, and is the most comprehensive analysis of Ontario's legal framework in this area in almost thirty years. The report highlights the obstacles individuals face in accessing justice in POA, capacity, and guardianship matters, which are almost impossible to resolve during the lifetime of the individual who is the subject matter of the dispute.

Among its 58 recommendations for strengthening the laws around substitute decision-making, the LCO proposed that the government create a specialized, expert tribunal with broad jurisdiction in this area of the law, and the ability to provide flexible and holistic approaches to disputes. Bringing disputes out of the courtroom and into a tribunal setting would help reduce the cost, complexity, and time to resolve these sensitive matters.

The LCO further recommended that individuals should have the option to name one or more "monitors," who would have statutory powers to discuss the use of the POA with the donor and to review the records and accounts kept by the donee. If the monitor has reason to believe that there is abuse or misuse on the part of the donee, then the monitor would be obligated to report these concerns to the Ontario Public Guardian and Trustee.

It remains to be seen whether the provincial government will implement the LCO's recommendations. In the meantime, it is critical that we properly organize our affairs, do it while we are in good health, and ensure to communicate our wishes to our trusted family members and loved ones. 

A power of attorney (POA) is a legal document that allows an individual to appoint someone else - usually a spouse, domestic partner, trusted family member, or friend - to make decisions on his or her behalf in specified or in all legal and financial matters. The person transferring the power is called the "donor" or "grantor" and the person receiving the power is known as the "donee" or the "attorney." Depending on how the POA is written, the appointment of the attorney can come into effect immediately, or can be triggered by specific circumstances, such as the donor being declared incapable of managing his or her affairs.

Although a POA can be drafted without professional assistance, if you have a complex situation or questions, it is always a good idea to seek legal advice and services from a lawyer who specializes in this area of law.

