

Planning for major life transitions

Incapacity planning

Incapacity planning is an essential but often overlooked part of a well thought out and comprehensive estate plan. Many people neglect planning what happens if they become unable to manage their financial affairs due to an accident, illness, injury or cognitive decline. Without a proper plan, there can be a number of stressors for a family, including legal battles, financial hardship and anxiety.

Power of attorney for financial matters

A power of attorney (POA) is a legal document giving another individual or entity the legal authority to make decisions about a person's financial affairs. The POA can be for a specified duration or for an unlimited period of time. An enduring or continuing power of attorney, can go beyond incapacity, permitting the individual or entity appointed to continue to act on their behalf for financial decision making.

An attorney for financial matters is typically able to do almost anything the individual can do, such as pay the bills, sell property and manage investments. They cannot make a will on the individual's behalf or change beneficiary designations. A person can choose to put restrictions in their POA if they don't want the attorney to be able to make certain decisions.

As long as the individual has mental capacity, they can continue to make decisions about their finances. The individual may also revoke the POA as long as they follow the applicable rules for their province. There are risks to creating a limited POA. The restrictions may not allow the designated individual to handle all the necessary financial or legal matters they need to.

A person has the right to appoint more than one attorney in the same POA and can also name alternates in case the original individual is unable or unwilling to act. If more than one attorney is named in the POA, the POA should specify whether it is a joint appointment (individuals must make all decisions together) or a joint and several appointment (decisions can be made together or separately).

The advantage of a joint appointment is that they share the responsibility and more than one person has oversight. There is a check and balance which can help avoid potential abuse. But since both individuals must be present for any signing, this may be problematic if one attorney is out of town.

For a joint and several appointment, one individual may sign without the other being present. While a joint and several appointment provides more flexibility, there is an increased risk of financial abuse, as one attorney could act without the other attorney's knowledge or consent. In addition, if the two co-attorneys don't agree, one is still able to make decisions without the other, which could result in a court application to remove one of the co-attorneys.

It is important that an individual has an extensive discussion with their lawyer on which appointment would be best, based on their particular situation.



Power of attorney for health

A power of attorney (POA) for health allows an individual to appoint someone to make medical decisions on their behalf should the person become unable to do so. This POA only comes into effect on incapacity. It covers medical and health care decisions such as treatment options, surgery, medications and life support choices. It works alongside a living will document which typically outlines the person's health care and end of life wishes.

Each province has its own name for this document. Similar to the power of attorney for financial decisions, the individual can have a joint appointment or a joint and several appointment.

Multiple jurisdictions

The rules governing powers of attorney vary from jurisdiction to jurisdiction. If a person has property in multiple jurisdictions, it may be a good idea to have a financial POA for each jurisdiction where assets are located. It is a good idea to speak to a lawyer in the foreign jurisdiction to ensure the person's Canadian POAs are also valid there. If separate documents are required and drafted in a particular locale, it is important that these newly signed POAs **do not include language that automatically revoke the individual's prior POA**, unless that is their intention. The document should clearly state that it is complementary rather than to revoke the other.

Incapacity planning checklist

- Create a power of attorney (POA) for financial matters. Appoint someone trustworthy to manage the finances when planning for incapacity.

- Name alternates in case the primary attorney is unable or unwilling to act.

- Establish a relationship between the financial advisor and the attorney.

By following these steps, an individual can create an effective incapacity plan that can protect their financial wellbeing when they need it most.

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