

Powers of Attorney: FAQs

Whether you are considering preparing Powers of Attorney as part of your estate plan, or you have been appointed under a Power of Attorney, you may find the following information helpful.

Q. What is a Power of Attorney?

A. Power of Attorney (or Mandate for Incapacity in Quebec) is written legal authority given by one person (the grantor or donor) to another person or institution (the attorney) to act on the grantor's behalf.

Q. What is the difference between a Power of Attorney for Property and a Power of Attorney for Personal Care?

A. Power of Attorney for Property empowers the attorney to manage the grantor's property and financial affairs. A Power of Attorney for Personal Care (known as a Representation Agreement in British Columbia) empowers the attorney to make personal care decisions in respect of the grantor including choices about health care, nutrition and shelter. Both general types are available in all provinces, though terminology may vary.

Q. What is a Representation Agreement?

A. In British Columbia Representation Agreements allow you to appoint someone to act on your behalf with respect to your personal care and health care decisions. Although a Representation Agreement may also cover financial and legal matters, a Power of Attorney for Property is most commonly used.

Q. When can a Power of Attorney be made?

A. So long as the requirements (age/capacity) set out in the governing provincial legislation are met, you can make a Power of Attorney at any time. Powers of Attorney are usually prepared as part of the Will and estate planning process. You can also revoke your Power of Attorney at any time so long as you are competent (as per the standards set out in the applicable provincial legislation) to do so.

Q. When does a Power of Attorney take effect?

A. A Power of Attorney for Property is effective upon execution, unless otherwise stated in the document. Because most Powers of Attorney are prepared as a precautionary step only, few grantors want them activated immediately. A grantor should therefore ensure that the document appoints (and is held by) a trustworthy party with explicit instructions as to its release. A Power of Attorney for Personal Care may only be used in the event the grantor becomes incapable of making their own personal care decisions.

Q. Who can be an attorney?

A. A grantor may appoint one or more individuals (jointly or in succession) and/or a trust company. Depending on your province, certain persons may be prohibited from acting as an attorney. These include an individual who provides personal care or health care services to the grantor for compensation (other than a child, parent or spouse of the grantor) and an employee of a care facility in which the grantor resides and through which the grantor receives personal care or health care services (unless that person is a child, parent or spouse of the grantor). A trust company may not act as an attorney for Personal Care or representative under a Representation Agreement.

Q. What if I become incapable, but haven't prepared Powers of Attorney?

A. If you become incapable and don't have valid Powers of Attorney (or a Representation Agreement in British Columbia) an application to court will be required to give an individual or trust company the power to act on your behalf. Failing this, important decisions about your finances or personal care may not be made. Depending on the situation, this may require the involvement of The Public Guardian and Trustee, or equivalent provincial body.



Q. What are the common misunderstandings about Powers of Attorney?

A. Grantors, on the one hand, are often unaware of the wide powers and scope of authority being given to their attorney. They may also be unaware that these powers may, unfortunately, be misused. On the other hand, attorneys are often surprised to learn the extent of the responsibility they have undertaken and the amount of sometimes complex work involved.

Q. Can an attorney be compensated?

A. Attorneys can be reimbursed for reasonable out of pocket expenses. However, in certain provinces, unless there is an express authorization in the document and an “amount” or “rate” of compensation specified, they cannot be compensated for acting as an attorney. Grantors will want to give this some consideration since their attorney might otherwise refuse to act or resign if their work becomes too onerous.

Q. What duties does an attorney undertake?

A. The attorney must always act diligently and in good faith for the grantor’s benefit. Specific duties, set out in the applicable provincial legislation, may include:

- Consulting with supportive family members and friends of the grantor from time to time
- Keeping accounts of all transactions involving the property
- Determining whether the grantor has a Will and, if so, its provisions
- Making expenditures from the grantor’s property that are necessary for their support and care
- Managing the grantor’s financial assets, investments, real estate, etc.

Q. Does an attorney assume any liability?

A. An attorney may be liable for any loss resulting from a breach of their duties. As such an attorney who abuses their position or fails to properly discharge their obligations—including maintaining a particular standard of care—may be required to compensate the grantor, or the estate beneficiaries, out of the attorney’s own pocket.

Q. Can an attorney refuse an appointment?

A. Just like with an executor appointment, the named attorney is not obliged to take on the responsibility. An attorney should think carefully about their expertise and availability before assuming the role.

Q. Can an attorney seek professional help in fulfilling their role?

A. Yes. The experts at Scotiatrust can work with you to help ensure your duties are performed and powers are exercised to the expected standard of care.

Our estate planning professionals at Scotiatrust have expertise and experience in all aspects of estate planning and administration. We can assist you in developing your Will, Powers of Attorney and act as your executor and attorney for property. In addition, should you be named as an executor or attorney for property, we can help you fulfill your responsibilities and gain valuable peace of mind.