

## THE POWERS THAT BE: HOW TO USE YOUR POWER OF ATTORNEY



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### Estate Planning & Wealth Preservation Update

When you're planning your estate or getting your personal and financial affairs in order, a power of attorney is an important piece of the puzzle that should not be overlooked. Many people either fail to understand how versatile a power of attorney can be and think of it only in the context of a relative losing their cognitive capacity or confuse it with a Will. Whereas a Will provides instructions to your executor regarding the distribution of your assets upon your death, a power of attorney allows you to appoint someone to manage your legal and financial affairs while you are still alive. This article gives a broad overview of powers of attorney and the different ways that you can use them, while also highlighting common mistakes that people make when drafting their powers of attorney.

#### What is a Power of Attorney?

Once you are a capable adult, no other person has legal authority over your affairs. A power of attorney is a legal document that you sign to give one or more attorney(s) the authority to manage your money and property on your behalf. Your attorney has authority to make decisions and do anything that you may lawfully do by agent, provided you understand the nature and consequences of the responsibilities that you are bestowing upon them. Your power of attorney will cease to have effect upon

your death and may also be terminated if your appointed attorney is convicted of fraud or goes bankrupt.

#### Types of Powers of Attorney

Powers of attorney can take different forms including:

- **General powers of attorney** that allow your attorney to manage your affairs while you are still mentally capable, but perhaps physically incapable or not available physically. If you become mentally incapacitated (e.g. through the onset of dementia or a stroke), a general power of attorney will cease to have effect; and
- **Enduring powers of attorney**, which unlike a general power of attorney, will continue to have effect if you are no longer mentally capable.

Both general and enduring powers of attorney may be drafted to limit the authority of your attorney to a specific task (**'limited power of attorney'**) and/or so that the power of attorney does not become active unless triggered by an event such as an accident or illness (**'springing power of attorney'**). In any case, you should be aware that even if your document is titled 'General Power of Attorney, if it contains

language to the effect of “this power of attorney continues despite the adult’s incapacity” it may actually be an enduring power of attorney. Similarly, a document titled “Enduring Power of Attorney” that does not contain language indicating that it will endure or take effect if the adult is incapacitated, might effectively be a general power of attorney.

Enduring powers of attorney made in jurisdictions outside British Columbia may still be valid, if they conform to the requirements prescribed in the *BC Power of Attorney Act* and *BC Power of Attorney Regulation*.

### Who Should be Appointed as Your Power of Attorney?

When appointing your attorney or co-attorneys, it is important to choose someone that you completely trust without hesitation. You should be confident that your attorney will always act in your best interest and will not misuse the power that you have granted them. Depending on the scope of your power of attorney, your attorney may have substantial control over your property and finances. Therefore, it is imperative that you discuss their responsibilities with them and ensure that they understand their duties and are agreeable to taking them on. Also, financial abuse and elder abuse are serious issues and can be exacerbated by the fraudulent use of powers of attorney<sup>1</sup>. Therefore, you should understand the steps to cancel your power of attorney, which involves serving a notice of cancellation on your attorney and any institution or office that has a copy of your power of attorney on file.

Most people choose family members or close friends. You may also appoint more than one attorney, with one primary attorney and one alternate. The benefit of appointing a primary attorney and a substitute, is that the substitute can take over if the primary attorney becomes sick or is unable to perform their duties. Alternatively, two or more attorneys can share or divide the responsibilities. If no one in your life is able to act, then you should consider appointing a trust company to act as a corporate attorney.

### What Can a Power of Attorney Do?

Section 20 of the *Power of Attorney Act* allows your attorney to do almost anything with your finances and property. Unless there are restrictions in your power of attorney, your attorney can do your banking, sign cheques, buy or sell real estate<sup>2</sup>, and buy consumer goods in your name. It is important to note that the attorney does not become the owner of any of your money or property, they only have the authority to manage it on your behalf. The attorney cannot use your assets for their own benefit unless an exception is made in the document.

### What Can't a Power of Attorney Do?

Despite their broad powers noted in the previous section, an attorney’s authority is subject to the following restrictions:

1. An attorney cannot break their fiduciary duty to act in your best interest and must avoid conflicts of interests;
2. An attorney cannot make, cancel or change your will (s.21 of *Power of Attorney Act*);
3. An attorney cannot make decisions on your behalf after death;
4. An attorney cannot do something that you must do personally, such as swear an affidavit or make an executive decision as the executor of an estate;<sup>3</sup>
5. An attorney cannot assign or delegate executive authority;
6. An attorney cannot make decisions regarding your health and personal care; and
7. An attorney cannot change or transfer power of attorney to someone else.<sup>4</sup>

### How Can a Power of Attorney be Used?

As discussed, a power of attorney can be used for a variety of purposes:

#### Illness or Accident

If you become ill, develop dementia or have an accident, a power of attorney allows your attorney to take care of all your legal and financial obligations on your behalf, including your rent, mortgage, taxes, credit card payments, phone and internet bills,

<sup>1</sup> <https://www.canada.ca/en/employment-social-development/corporate/seniors/forum/power-attorney-financial.html>

<sup>2</sup> Powers of Attorney that are used for buying and selling real estate must be accompanied by statutory declaration confirming that the attorney is at least 19 years of age.

<sup>3</sup> There is an exception here under the BC Supreme Court Civil Rules for cases where an affidavit is required from a “patient” as defined in the *Patients Property Act* – in such cases, the patient’s litigation guardian may swear/affirm an affidavit based on information and belief.

<sup>4</sup> Attorneys do have the right to decline their duties at the time of appointment.

utilities bills and car insurance. If you own a business, you may also authorize your attorney to have signing authority and handle business operations if you become incapacitated.

For these scenarios, it is important to remember that if the illness or accident leaves you mentally incapacitated, a properly drafted enduring power of attorney will continue to have effect while a general power of attorney will not. Also, when you are mentally incapacitated you cannot draft a new power of attorney as you are not in position to understand and appreciate the significance of obligations that you are bestowing upon your attorney. Remember, without any valid enduring power of attorney in place, your relatives, friends or business partners will have to apply for a committee order in the Supreme Court of British Columbia in order to manage your financial and legal affairs. This process can be expensive as well as stressful and time consuming. Therefore, an enduring power of attorney is preferable to a general power of attorney if you are looking to cover situations where your mental capacity is limited. You are more likely to suffer from a permanent or temporary disability during your life than to die.

### Real Estate Transactions

If you are out of town when your real estate transaction is closing, a power of attorney granting the attorney signing authority in a real estate transaction can be used to ensure the completion of the real estate transaction.

As per Section 51 of the *Land Title Act*, to use your power of attorney in a real estate transaction you are required to register a copy of it with the Land Title Office, along with a statutory declaration which confirms the attorney is at least 19 years of age. A general power of attorney is usually limited in their authority and may only be able to do certain tasks such as sell your property while you are absent. Moreover, as per section 56 of the *Land Title Act*, a power of attorney is no longer valid 3 years after the date of its execution unless it is an enduring power of attorney or it expressly states that section 56 does not apply. Thus, for real estate purposes, an enduring power of attorney may be preferable to a general

power of attorney if you want your attorney to have broader power and remain in effect for longer. Meanwhile, a general power of attorney is likely better suited to situations where you only want to give your attorney authority to do a specific task and/or for a shorter period.

A power of attorney may also be used to purchase or refinance property. However, you will want to check with your financial institution, as each one has different policies regarding the use of a power of attorney for mortgages. Although a power of attorney can give your attorney the authority to handle all your financial matters, some financial institutions will not permit your attorney to sign off on a loan or mortgage on your behalf, unless the power of attorney document explicitly states that they can.<sup>5</sup> Other institutions might have policies prohibiting the use of powers of attorney for a mere refinance or require you to fill out additional identification forms and provide documentation that details the circumstances and relationship between you and your attorney.<sup>6</sup> If you plan on using a power of attorney for a mortgage it is thus imperative that you keep up to date with your financial institution's policies regarding powers of attorney.

It should also be noted that section 27 of the *Property Law Act* prohibits attorneys from conveying property to themselves unless the power of attorney expressly authorizes them to do so. As such, if you wish your attorney to have signing authority for a loan of any kind or to convey property to themselves, your power of attorney should explicitly give your attorney that authority. A common oversight in drafting a power of attorney is failing to include provisions dealing with loans or conveyancing. This can especially cause problems for children who become attorneys for a parent having previously borrowed money from that parent which is secured by way of mortgage. If the parent becomes incapacitated, their child cannot execute a discharge of that mortgage, which must be carried out by a committee appointed under the *Patients Property Act*.<sup>7</sup>

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<sup>5</sup> [https://online.cle.bc.ca/CoursesOnDemand/PdfFile?fileName=2011/511\\_1\\_1.pdf](https://online.cle.bc.ca/CoursesOnDemand/PdfFile?fileName=2011/511_1_1.pdf)

<sup>6</sup> <https://www.bcraestatelawyers.com/using-a-power-of-attorney-to-buy-sell-or-refinance-real-estate>

<sup>7</sup> <http://pm.cle.bc.ca/clebc-pm-web/manual/42777/book/view.do#/C/1232515>

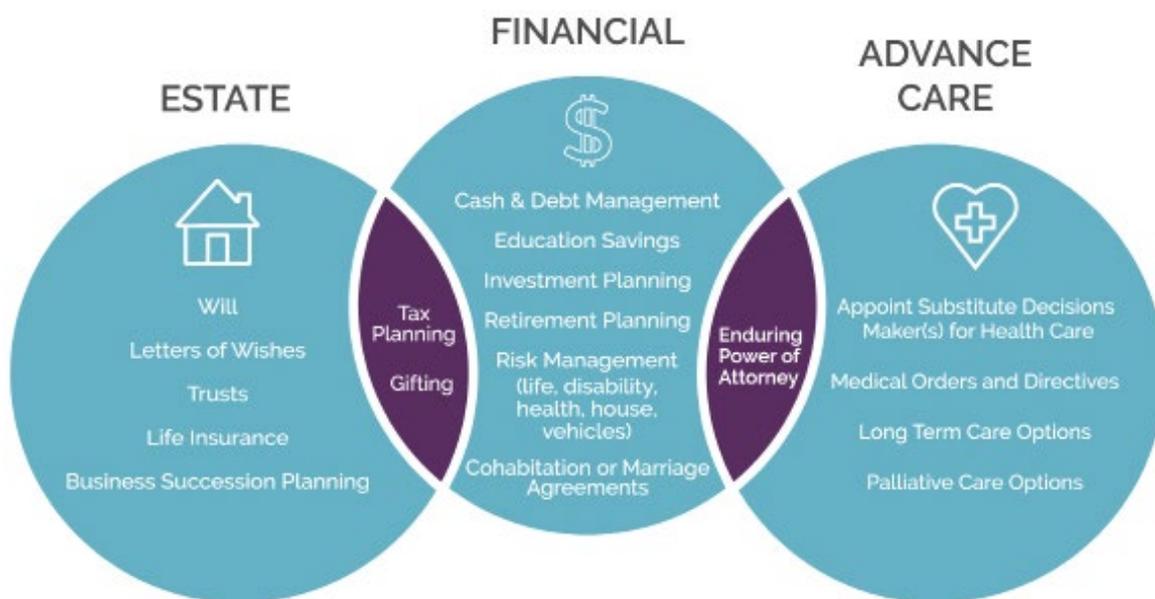
## Personal Affairs

As mentioned in the previous section, a power of attorney does not give your attorney authority over your personal and health matters. Instructions regarding these matters should be set out in a Representation Agreement for healthcare (or similar document depending on the province in which you live). Nonetheless, there are some instances where authority over legal and personal affairs can overlap. For example, through their control of financial decisions, your attorney may have some control over decision-making about personal affairs, as they may be able to authorize how money is spent in that area. Moreover, if litigation is commenced involving your personal or health matters, the subject matter of the

litigation would not be within your attorney's authority but the litigation itself is a legal issue that is within their authority. This is a grey area and the law is unsettled as to the extent of the attorney's authority in these situations, which are generally resolved on a case-by-case basis.

## Conclusion

A power of attorney is a versatile tool that everyone who is planning for a time when they may either temporarily or permanently not be able to manage their affairs, should consider having. This article sought to highlight this versatility while also giving an overview of what a power of attorney is as well as what it can and cannot do.



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