
Power of Attorney for property: Duties & responsibilities

Individuals can grant powers to others to manage their affairs in a number of different circumstances using various types of documents, often known as a power of attorney. Being appointed as a substitute decision-maker for someone's financial affairs through a power of attorney is a huge honour and obligation. Here are some of the more important things to keep in mind for those taking on this significant role.

- 01** An attorney must act in the best interests of the donor and cannot gain any personal benefit from their position.
- 02** An attorney must keep all of the donor's assets separate from their own and be able to account for all monies spent or received on the donor's behalf.
- 03** If an attorney is responsible for a large amount of money or complex assets, they should consider speaking with experts to help ensure they properly exercise their duties.

NOTE

For the purposes of this article, the person who has been granted the powers in the governing document will be referred to as the "attorney" and the person who has granted the powers will be referred to as the "donor."

Although these documents are also referred to as mandates in Québec and sometimes known as representation agreements in British Columbia, they will be generically referred to as "powers of attorney."

When the attorney can act

The terms of the power of attorney document will govern when the attorney can act. Although many powers of attorney become effective immediately upon execution of the document, the donor will continue to have authority over his or her own affairs. IG will continue to take instructions from the donor until such time as he or she becomes incapable of giving them. In addition, IG will not take instructions from an attorney until such time as the document has been submitted and approved for use. So long as the donor has capacity, their instructions will be favoured over the instructions of an attorney where there are conflicting instructions.

Once the donor starts to lose mental capacity, the attorney will not be able to make decisions on the donor's behalf unless the document specifically grants such authority, or in Québec, upon court approval of a protection mandate. While an attorney always has a fiduciary responsibility to manage the donor's assets appropriately, performing their duties diligently, honestly, in good faith and for the donor's benefit becomes critical once the donor loses capacity. The attorney cannot obtain any personal advantage from their position.

The attorney cannot obtain any personal advantage from their position.

Managing the donor's assets

The attorney must carefully manage the donor's assets and preserve the value of the donor's estate to the extent possible. All investment decisions must be in the best interests of the donor, not the attorney or the estate beneficiaries. Although there are generally no limitations on which types of mutual funds or investments an attorney can invest the donor's money in, the attorney must invest the donor's assets prudently, and in keeping with the donor's future needs. The attorney should ensure that the donor's assets are properly diversified, consider the donor's liquidity needs and especially review the terms of the power of attorney document to see if any particular types of investments are prohibited.

The attorney must keep all of the donor's assets separate from their own (except for property that they already own jointly) and the attorney must be able to account for all monies spent and/or received on the donor's behalf. Depending upon the assets involved, it may be a good idea to hire an accountant or lawyer to help, as in some jurisdictions the records are to be kept in a specific format. The attorney may be required to complete a "passing of accounts" by the donor, or by the beneficiaries of the donor's estate at a later date. It is also possible that a provincial authority, such as the Public Trustee (or Public Curator in Québec) may require the attorney to produce records to justify

how they have been managing the donor's assets. The attorney can speak to a lawyer about the process involved in passing the accounts on a yearly or periodic basis so that he or she cannot be questioned later about transactions that happened many years previous. If the attorney does not pass the accounts on a periodic basis, he or she should keep all records regarding any amounts received or expended on behalf of the donor, regardless of how many years in the past these transactions may have occurred.

The attorney cannot transfer ownership of the donor's assets into anyone else's name unless the property has been sold for fair market value (although again, beware of any potential conflicts of interest if the attorney or anyone in his or her immediate family is the purchaser of the property). In some cases, selling certain properties may be unavoidable in order to maintain the donor's lifestyle, but the attorney should exercise caution in exercising this responsibility. Conversely, if the donor has assets that are no longer needed or used, the attorney should consider selling them or renting them at fair market value to minimize unnecessary expenses being incurred by the donor and maximizing the value of the donor's assets.

The attorney generally cannot derive any personal benefit from their position. For example, if any of the donor's property is to be sold or rented, the attorney cannot purchase or rent the property without the consent of the donor's estate beneficiaries (or a court). In Québec, the donor, or if unable the court, must authorize this type of transaction. If possible, the attorney should try to avoid receiving any personal benefit from the donor's assets in order to avoid difficult questions later. Exceptions may be made, for example, where the attorney is one of the donor's dependants.

Expenses and gifts

Although an attorney may incur expenses to support individuals who are financially dependent upon the donor (e.g., their spouse or minor children), gifts to third parties (including the attorney) are generally prohibited unless the document specifically authorizes them. Some jurisdictions (including British Columbia, Ontario and Saskatchewan) allow gifts in very limited amounts. Speak to your IG Consultant or your lawyer about what the rules are in your jurisdiction. Even where a jurisdiction permits gifts,

the donor must have given similar gifts in the past or expressed a desire to make such gifts, the gift should not jeopardize the donor's needs, and where the gift is being made to the attorney, the power of attorney document should specifically authorize the gift. Caution should also be exercised in making loans using the donor's assets (which is also generally prohibited except in certain jurisdictions, where specific conditions are met, such as charging fair market interest).

Although an attorney can be reimbursed for expenses incurred in the course of conducting their duties, the expenses must be reasonable and the attorney must keep sufficient receipts or documentation respecting those expenses. The attorney can incur expenses for the benefit of the donor and in keeping with their accustomed standard of living, but the attorney must be very careful in how he or she spends the donor's money. The attorney may not receive compensation from their position unless a court approves the compensation, although in Ontario, Québec, Saskatchewan and the Yukon compensation may be taken if the document specifically authorizes it.

The donor's estate

The attorney will not be allowed to make any changes to the distribution of the donor's estate. This means that the attorney will not be able to change the donor's will, add or change beneficiary designations on any of the donor's TFSAs, RRSPs, RRIFs or insurance policies or add anyone as a joint owner to any of the donor's assets. (Note that in Québec, only annuity and life- insurance contracts can have a beneficiary designated). If the donor had appointed someone as the direct beneficiary of a particular asset, that designation may be continued if the form of the investment changes but new contributions should only be made to accounts where there is no beneficiary designation.

If the attorney is unsure as to how to manage any of the donor's assets, he or she should speak to the donor's IG Consultant with regard to investments, and to the lawyer/notary or accountant for professional advice.

This is not an exhaustive list of everything an attorney should consider. The attorney should carefully review the terms of the power of attorney document and familiarize themselves with the donor's assets and ongoing needs. Particularly where the attorney is responsible for a large amount of money or complex assets such as a business, they should consider the advisability of speaking to experts to ensure they are exercising their duties properly.

MEMBER1 TRADE NAME

Member1 First Name Member1 Last Name Member1 Designation
Member1 Title
Member1 Discipline 1 Member1 Discipline 2 Member1 Discipline 3 Member1 Discipline 4
Member1 Dealer Line 1
Member1 Dealer Line 2



Member1 Preferred Phone Number Member1 Preferred Phone Extension | Member1 Business Email Address

INVESTORSGROUP.COM / f / t / y / in / MEMBER1 WEB PAGE

6-Insurance 5-Newsletters 1-Trademark

© Investors Group Inc. 2016 MP2032 (06/2018)