EXPLAINING POWERS *of* ATTORNEY

Exploring what you need to know about one of the most critical—yet often overlooked—aspects of estate planning.

Original artwork by Joanne Tod

Lucy Main, partner and co-chair of the Wills, Trusts, and Estates Practice group at WeirFoulds LLP, (weirfoulds.com) practices exclusively in the areas of estate and trust planning and administration. At the Minerva Summit, she co-led a workshop with Meghan Moore, an Investment Counsellor with Burgundy's Private Client Team, covering a critical element of estate planning: powers of attorney.

First, a disclaimer: substitute decision-making and powers of attorney (POA) are governed by the provinces. As an Ontario-qualified lawyer, the text below is from the Ontario perspective. While these concepts share similarities across Canada, it is important to note that the laws and procedures governing POAs differ by province and territory. The intention is not to provide specific legal advice but rather to encourage thoughtful consideration of POAs and to prompt informed discussions with your legal counsel.

In Ontario, POAs are structured as two separate documents, each addressing a specific area of decision-making. Historically, a single document could encompass both property and personal care, but this is no longer the case. We will begin by discussing POAs for property before addressing POAs for personal care.

POWERS OF ATTORNEY FOR PROPERTY

The power of attorney (POA) for property grants the designated "attorney" authority to manage your financial affairs, including bank accounts, real estate, securities, and shares in private companies. The attorney can act on your behalf in all matters related to your assets, except for altering your will. (In this context, "attorney" does not mean lawyer; it refers to the individual you appoint to act on your behalf.) While you can place restrictions on the POA, it provides full authority by default unless otherwise specified.

Everyone over the age of 18 should have a POA for property. If you have financial assets—such as a bank account, real estate, or investments—and become incapacitated due to a coma, cognitive decline, or a brain injury, someone does not automatically have the authority to make financial decisions on your behalf. This means a parent is not automatically able to make financial decisions for an adult child who has had a brain injury, nor are spouses able to automatically make such decisions for one another if and when one has dementia, for example. In such cases, someone would need to seek a court-appointed guardian to manage your affairs, which is a costly process that is time-consuming and lacks privacy.

When Powers of Attorney for Property Take Effect

A POA for property can be "springing" or "non-springing." A non-springing POA becomes active as soon as it is signed, even if it is not immediately used. In contrast, a springing POA activates only at a specified time or upon the occurrence of a specific event, typically when the grantor loses capacity. Most people prefer non-springing POAs, as they remain technically active in the background without requiring additional steps when really needed. Springing POAs, on the other hand, often use incapacity as a trigger and require some sort of a test to be met to confirm that the grantor lacks capacity, which can introduce complications during an already stressful time.

Determining capacity is not always straightforward. Many POAs require the attorney for property to first obtain two doctors' letters, but many doctors are not specifically trained to assess capacity to manage financial affairs, and their evaluations can be inconsistent or subjective. Increasingly, doctors are reluctant to provide such letters, further complicating the process.

What the POA for Property Document Covers

POAs can be simple and grant the attorney the authority to handle all financial matters. Or they can be detailed and set out what the attorney can and cannot do. A detailed POA allows you to specify the extent of your attorney's powers. For instance, should they be allowed to engage in last-minute probate fee and/or income tax planning, or make gifts or loans on your behalf to family, friends, or charities? Are there restrictions you would like to impose? Should they have the ability to delegate their responsibilities?

If you own or manage a business, additional considerations arise. Do you want your attorney to have the authority to appoint themselves as a director of your company, or would that create a conflict of interest? Alternatively, would it be better to appoint a separate attorney to handle specific assets, such as a private business?

A detailed POA offers several advantages. It provides clarity to the grantor regarding the powers being assigned, ensures financial institutions can verify the attorney's authority more easily, and minimizes the potential for future disputes among family members or other interested parties.

Additionally, if you have assets outside Ontario—such as property in Florida or Quebec—you may require separate POAs that comply with the laws of those jurisdictions. Without proper planning, managing assets across regions can become complex, challenging, and costly.

Choosing your Attorney for Property

When selecting an attorney for property, you can choose one or more individuals, such as family members, friends, trusted advisors, or professionals. You may also appoint an entity, like a trust company. If you select multiple individuals, you can structure the

Right: Lucy Main, at Minerva Summit.

Top to bottom: Meghan Moore and Lucy Main; Sarah MacNicol; Burgundy Chief Investment Officer Anne-Mette de Place Filippini and Yeugenia Kazantseva at Minerva Summit

arrangement in different ways:

- **Joint appointment:** Attorneys must act together and agree on all decisions.
- **Joint and several appointment:** Attorneys can act independently of one another.

If you do not specify, decisions will automatically require unanimous agreement.

Choosing an attorney for property is much like hiring for a job—it depends on the individual's skills, experience, and their ability to handle the specific "job" of managing your assets. One of the most critical qualities is their ability to collaborate with professionals. Can they effectively communicate with your accountant, financial advisor, or lawyer? If so, they are likely equipped for the role.

How many attorneys should you appoint? If, for example, you have three children, should you name all of them? While this may seem fair and equitable, the individuals must be able to cooperate effectively. Factors like family dynamics, the complexity of your financial affairs, differing opinions, and logistical challenges (such as locations or time zones) can create complications. Appointing multiple attorneys can lead to conflict if they are unable to work together.

It is important to remember that while being chosen as an attorney is an honor, it can also be a demanding and time-intensive role that carries significant responsibility. For this reason, prioritize selecting the right person(s) based on their capabilities and suitability for the role, rather than out of concern for hurt feelings.

POWERS OF ATTORNEY FOR PERSONAL CARE

The POA for personal care differs from the POA for property in two

significant ways. First, it has no connection to financial matters; instead, it governs decisions related to health care, welfare, medical treatment, and end-of-life treatment. Second, it only takes effect when you are no longer capable of making such decisions for yourself.

In Ontario, the absence of a POA for personal care is handled differently from the absence of a POA for property. Provincial legislation provides a default hierarchy of individuals who can make decisions in your best interests. While this backup system ensures someone will step in if needed, most people prefer to retain control by choosing who will act on their behalf. Having a POA for personal care also allows you to provide clear instructions and guidance on your specific wishes, ensuring your preferences are respected.

Determining Capacity for Personal Care POA

The POA for personal care takes effect only when you are no longer able to make personal health-care decisions for yourself. This involves a legal test to determine incapacity, which often requires input from doctors. A doctor may need to make a statement, such as, "I can no longer take instructions from your mother because she does not understand the nature of the question or its implications."

Selecting Attorneys for Personal Care

Your attorneys for personal care can be the same or different from those appointed for property, and it is not uncommon for people to choose different individuals for each role, given that they cover distinct areas of responsibility and require different skills. For example, you might select a financially savvy, type-A personality for the POA for property, and someone more empathetic and patient for the POA for personal care.

When choosing an attorney for personal care, it is essential that they share your values and approach to decision-making. Consider potential differences in perspectives, including religious beliefs, personal biases, or life experiences, that could impact how they interpret and apply your wishes.

If you appoint different individuals for the two roles, it is also important to think about how they will interact and work together. Your attorney for property, who manages your finances, must respect the financial needs communicated by your attorney for personal care. The latter will be acting in alignment with your wishes, which could involve significant financial costs, and it is crucial that both attorneys cooperate to ensure your desires are honored.

Wishes

You may be familiar with letters of wishes or advance care directives. While these instructions can sometimes be communicated verbally, best practice is to provide a formal letter or document. This letter can be separate from your POA for personal care or included within it—both options work.

These wishes and directives may include preferences such as staying at home for as long as possible, even if it involves additional costs; requesting no artificial life support if there is no hope of recovery; or maintaining specific grooming standards, such as routine haircuts, manicures, and dental cleanings, all tailored to your personal preferences.

BEST PRACTICES WHEN ACTING AS AN ATTORNEY

As you can imagine, serving as an attorney for property or personal care is a significant responsibility and it also carries substantial risks. Best practices for fulfilling this role include meticulous record-keeping (particularly for the POA for property), seeking guidance from professional advisors, and consulting with a lawyer if you have any concerns or questions about your responsibilities or the best course of action.

If you accept the role, it is important to be well-prepared, comfortable, and fully informed about the grantor's circumstances and wishes. Unfortunately, conflicts can arise within families, particularly when it comes to how an attorney manages the grantor's finances. This can become especially contentious when the estate is settled, and estate beneficiaries are disappointed with how the deceased's finances were handles in the years leading up to their death. To protect yourself and minimize potential disputes, it is essential to document every decision and seek professional assistance when needed.

In conclusion, establishing a POA for both property and personal care is crucial for ensuring your wishes are respected and your affairs are managed appropriately if you become incapacitated. While the laws vary by province, understanding the roles, responsibilities, and potential complications associated with POAs is essential for effective planning. Whether you are the grantor or the attorney, being well-informed, selecting the right individuals for the role, and seeking professional guidance can help mitigate risks and conflicts down the road. Ultimately, thoughtful consideration and proper documentation can provide peace of mind for both you and your loved ones. **M**

BURGUNDY ASSET MANAGEMENT LTD.

TORONTO

Bay Wellington Tower, Brookfield Place,
181 Bay Street, Suite 4510,
PO Box 778, Toronto ON M5J 2T3

MONTREAL

1501 McGill College Avenue Suite 2090,
Montreal QC H3A 3M8

VANCOUVER

999 West Hastings Street, Suite 1810,
PO Box 33, Vancouver BC V6C 2W2

FOR MORE INFORMATION CONTACT MINERVA@BURGUNDYASSET.COM | WWW.BURGUNDYASSET.COM/WOMEN