

AGING AND THE LAW SERIES

What Every Professional Needs to Know

POWERS OF ATTORNEY

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Introduction to POAs

- A power of attorney (POA) is a legal, written document whereby a person (the donor) appoints one or more persons (the attorney{s}) to stand “in his or her legal shoes”
- The attorney may conduct financial transactions on behalf of the donor
- POAs are useful when the donor is unable to perform the duties entrusted to the attorney
- - Examples: Donor may be absent (out of country), have mobility issues (common with older adults), or be incapable

Introduction to POAs

FINANCIAL NEXUS OF CAPABILITY

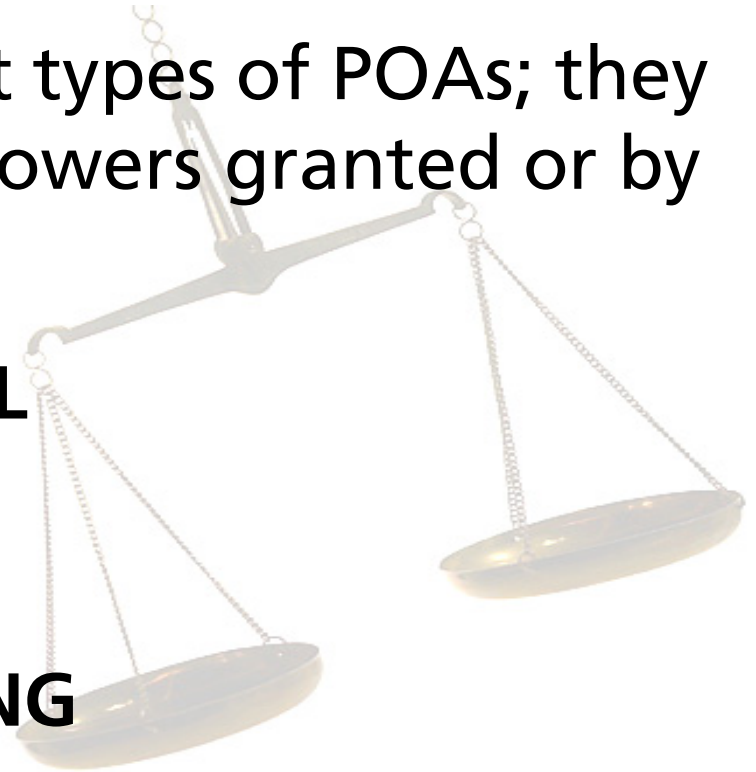
- Financial decisions only
- If no enduring or springing POA, then goes to Public Guardian and Trustee (PGT)

CAPABLE	INCAPABLE
YOU DECIDE	GUARDIAN
	ATTORNEY
	PGT LOCATES SOMEONE
	PGT - ONGOING

Introduction to POAs

There are several different types of POAs; they may be distinguished by powers granted or by operation:

- **GENERAL**
- **LIMITED**
- **ENDURING**
- **SPRINGING**



Types of POA: General

General or Regular POAs

- The standard agreement between donor and attorney(s)
Will generally give power to conduct all financial transactions on donor's behalf
- Power of attorney ends on incapability or death of donor
- Rarely used now because of its limited scope

Types of POA: Limited

Limited POAs

- Grants attorney power over specified financial matters or for a specified time
- Ends on incapability or death of donor

Examples:

- POA to handle all automobile insurance matters
- POA to conduct financial transactions for x number of months

Types of POA: Enduring/Continuing

Enduring or Continuing POAs

- Similar to a general POA, but remains in force after the donor becomes incapable (but not after death).
- Reflects modern advance planning – replaces general POA as the standard.
- Called a “durable” POA in the US.

Types of POAs: Springing

Springing POAs

- Special form of POA that resembles representation agreement.
- Remains dormant until donor becomes incapable, then springs into effect.



Relevant Legislation

The common law recognizes POAs, but not enduring POAs:

- A POA is deemed to invalid when the donor becomes incapable

POA legislation falls under provincial jurisdiction:

- Each province has its own Powers of Attorney Act, which governs the document in that jurisdiction.

Exceptions:

- Ontario has a Substitute Decisions Act
- New Brunswick POA legislation falls under its Property Act

Relevant Legislation

- BC was the first province to create legislation specific to enduring powers of attorney
- Some law reform agencies have recommended uniform legislation for POAs to prevent inter-jurisdictional issues for donors and attorneys (and the lawyers who draft the POA)

Duties and Obligations of Attorneys

- The Powers of Attorney Act of each jurisdiction sets out the duties of the attorney to the donor.
- Attorneys are required to act in the best interests of the donor and within the scope of their authority (as granted by the POA document).



POAs and the Potential for Misuse

- The nature of POAs makes donors susceptible to abuse or exploitation – it is a transfer of power over property
- Similarly, granting power to attorneys creates potential for misuse, both innocent and intentional
 - *Attorney may not be financially savvy or aware of his or her obligations*
 - *Opportunities to exploit are increased and may be acted upon*

Financial Abuse and Exploitation



- Financial abuse or exploitation of older adults is an increasing problem.
 - *It may take the form of unauthorized transfers of assets, withholding funds, or even amount to bankruptcy*
- While POAs are a useful tool for advance planning, there is an increased risk for this kind of abuse when the donor is a vulnerable individual or incapable
- Family and friends are most commonly named as attorneys, but also the most common abusers

Signs of Financial Abuse of Older Adult

- Uncertainty about status of money or assets
- Unpaid bills, taxes, insurance
- No money for groceries or necessities
- Substantial transfers of money or property without reason



Best Practices



There are three best practices that are particularly important when advising clients on POAs:

1. Meet with your client alone
2. Explain the nature and scope of the authority granted under the POA
3. Identify and explain other types of POAs and other instruments available in your jurisdiction

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Summary

References and Resources

Western Canada Law Reform Agencies, Final report:
"Enduring Powers of Attorney," 2008.

Laura Watts and Kevin Zakreski, "Powers of Attorney:
Moving Toward Best Practices in Canada," CBA Canadian Legal Conference, 2006

Power of Attorney Act R.S.B.C.1996, c. 370

Powers of Attorney Act R.S.A. 2000, c. P-20

The Powers of Attorney Act S.S. 2002, c. P-20.3

The Powers of Attorney Act C.C.S.M., c.P97

Substitute Decisions Act S.O. 1992, c.30

Property act R.S.N.B. 1973, c. P-19

Powers of Attorney Act R.S.P.E.I. 1988, c. P-16

Powers of Attorney Act R.S.N.S. 1989, c. 35

Enduring Powers of Attorney Act R.S.N.L. 1990, c. E-11

Enduring Power of attorney Act R.S.Y. 2002, c. 73

Powers of Attorney Act S.N.W.T. 2001, c. 15

Powers of Attorney Act S.N. 2005, c.9

Additional Resources

For information about how you can become a Certified Professional Consultant on Aging (CPCA) visit us at our website www.agefriendlybusiness.com

For information about the Canadian Centre for Elder Law visit us at our website www.bcli.org

THANK YOU!

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