

Mind the Gap

Canada's baby boomers need Power of Attorney planning to protect themselves

RBC Wealth Management

There's Wealth in Our Approach.™

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"Whether I shall turn out to be the hero of my own life, or whether that station will be held by anybody else, these pages must show."
Charles Dickens,
David Copperfield

Many of us want to be the hero in our own life story. Perhaps Charles Dickens himself wondered what happens when you can no longer be the writer of your own life story, and who will author your epilogue – the final chapter that will sum up what your life stood for and meant to you, your family and friends.

Fortunately for us, and not-so-fortunately for Dickens, a Power of Attorney document can help you choose the author who will continue writing your story when you are no longer able, so you can be remembered for what you accomplished in your life, instead of a final chapter filled with family dispute, fractured relationships and dissipated assets. Establishing a Power of Attorney (Mandate in Anticipation of Incapacity in Quebec) is a key part of any estate plan, and when reviewed and kept up-to-date, it can help ensure that your original plans for your wealth, assets and personal care are fulfilled as you intended. This planning is vital as the "gap" between "healthy" life expectancy and "average" life expectancy is nine to 11 years for Canadians.[i] However, 71 percent of Canadian adults do not have a signed Power of Attorney.[ii]



You probably give significant thought to the investment professional you choose to manage your investment portfolio, the legal counsel you choose to draft your Will, the realtor you choose to sell your house or the contractor you choose to repair it. You may conduct interviews or have initial consultations to ensure that they understand and respect your preferences, and feel comfortable that you connect on a personal level. But what kind of rigour do you use to choose the person who will make financial decisions for you and be in control of your assets, at a time when you are losing or have lost the ability to do so yourself?

While you may be aware of some of the potential risks if you do not have a Power of Attorney, the changing nature of family dynamics, caregiving and fraud in Canada means that, increasingly, there are risks involved even when a Power of Attorney is in place. Canadians should therefore use the same due diligence process to select an attorney or attorneys (called a mandatary in Quebec) as they would use to select their other professional advisors.

This paper will discuss how you can protect yourself with a Power of Attorney, and important considerations to mitigate your risk when choosing one or more attorneys. For specific estate planning advice and to establish a valid Power of Attorney agreement, please speak with a lawyer or notary in Quebec who specializes in estate planning.

Powers of Attorney for Property and Financial Management

A Power of Attorney is a legal document in which one person gives another person or people the authority to act on their behalf. A standard Power of Attorney for property empowers your attorney to legally make decisions about your finances and property on your behalf and that authority survives in the event that you become incapable of making these decisions yourself (as such, these attorneys may be described as "enduring" or "continuing"). In some provinces and territories, a different legal document may be used to delegate decisions about your personal care, or one document will contain your authority for an attorney to make both personal care decisions as well as financial and property decisions.

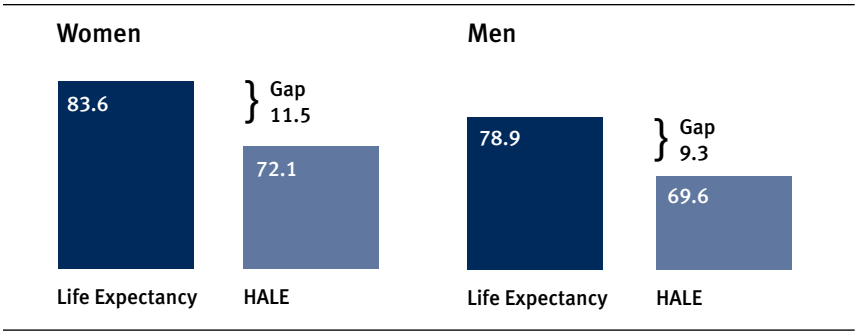
Typically, a Power of Attorney for property is only used if the person giving that authority (the donor) is unable to act or make decisions for themselves, although legally the attorney may have immediate authority even if the donor is still completely capable. The terms of the Power of Attorney document, the conditions for its release, and legislation in the donor's province or territory of residence will determine when the Power of Attorney is effective and may be used.

This paper will focus on Power of Attorneys for managing financial and property matters after becoming incapacitated. Please speak to your legal counsel to tailor your Power of Attorney to your personal circumstances.



Canadian Health Expectancy

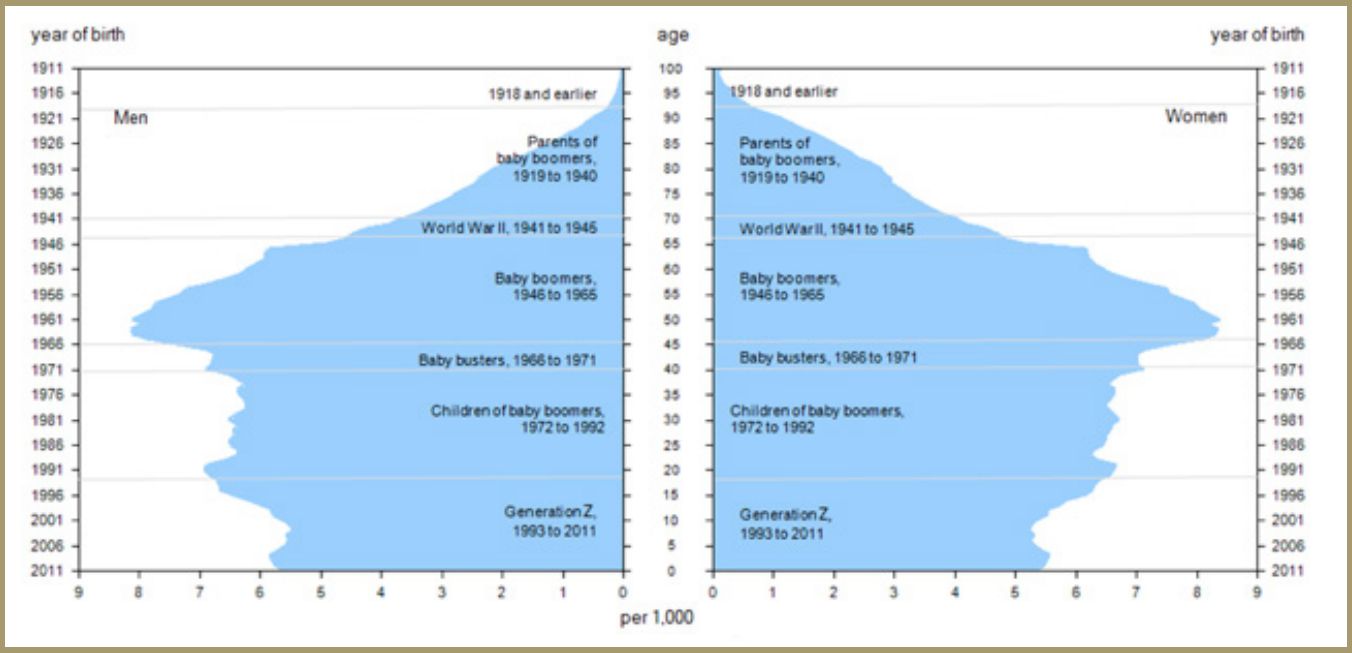
In part due to higher standards of living and advances in medical science, Canadians are living longer lives than even a generation ago. However the "gap" between average life expectancy and "healthy life expectancy" – taking into account the number of healthy or disability-free years that men and women can expect to live – tells another story. Healthy life expectancy for men and women, respectively, is 69.6 and 72.1.[iii] On average, then, Canadian men and women continue to live 9 to 11 years past the time when they are "healthy."



Average life expectancy and health-adjusted life expectancy (HALE) by sex, at birth in years, Canada not including Quebec, Nunavut and N.W.T.

Portrait of Generations in Canada[iv]

Among Canadian men and women, baby boomers represent the largest segment of the population. Many people in this cohort may lose some cognitive function as they age, making the importance of a valid, up-to-date Power of Attorney more important than ever.



A Power of Attorney is a way to protect your best interests, giving you control as to who will speak on your behalf when you are not able to do so, while at the same time providing guidance on how you wish to be cared for, and how to continue to manage your assets during your lifetime.

The Aging Baby Boomer Generation in Canada

As a greater number of Canadians grow older and prepare for the possibility of incapacity, planning ahead and establishing a Power of Attorney becomes more critical than ever.

A disproportionate number of Canada's population was born between 1945-1965. This cohort (commonly known as "baby boomers") has made a significant impact on all aspects of Canadian society, and will continue to do so. In 2011, nearly 15 percent of the Canadian population, representing nearly 5 million individuals, was 65 years of age or older.[v] That number has increased by almost 14 percent since 2006, when the number of Canadians aged 65 and older was 4.3 million. By the year 2036, that number is expected to double to reach 10.4 million, and by 2051, about one in four Canadians is expected to be 65 or over.[vi]

As the baby boomers age, there is expected to be an "attorney boom" for the management of boomers' assets. This means that there will likely be even more attorneys who may live or work in a different jurisdiction, lack financial or organizational ability, or be struggling to manage their own family's finances at the same time. This, coupled with governments' increased interest in regulating an attorney's activities, has resulted in a more complex task for the attorneys.

Planning Ahead for Incapacity

More than 100,000 Canadians will develop some form of dementia this year – in addition to over 500,000 Canadians who currently live with dementia.[vii] Because the rate of dementia increases significantly over the age of 85, more and more Canadians will continue to suffer from illnesses that affect cognitive function as the baby boomers age.[viii]

Given the increasing likelihood that we may need assistance with decision-making at some point in our lives, you must consider whether you do nothing and have your loved ones potentially incur a lengthy and expensive court process to have someone appointed to act for you, or whether you want to have a say in who manages your affairs when you are no longer able to do so. A Power of Attorney is a way to protect your best interests, giving you control as to who will speak on your behalf when you are not able to do so, while at the same time providing guidance on how you wish to be cared for, and how to continue to manage your assets during your lifetime.

Without a valid Power of Attorney in place, your province or territory will have specific rules for guardianship and decision-making if you are unable to manage your own financial affairs. Many people assume their spouse or next of kin will automatically be assigned the responsibility (or accept it willingly). However without a court order, your spouse and next of kin generally will not be able to access your financial information and assets. Without such access or ability to deal with your assets, your family must apply to the provincial government or court to have someone appointed to manage your affairs. A court-appointed guardian may also be required to post a bond with the court for an amount related to the total value of your property. This process can be lengthy and expensive. Competing applications can also be filed, adding to the cost and timing.



Financing Personal Care

Your attorney can play a critical role in the care you receive as your health-care needs change over time. Your attorney must manage your assets wisely and ensure that there are sufficient assets available to pay for that care. You may not know now what your needs will be in the future, such as whether you will require professional care at home or in a long-term care facility.

Many people believe that the federal or provincial government will handle the cost of this care.[ix] While the government may provide some financial assistance, there are limitations that require many people to pay for certain care services, or higher levels of care, out of their own pocket. These costs can be significant; accommodation in a long-term care facility such as a retirement or nursing home can range from $1,600 to $9,000 per month depending on the room type and the level of government funding available in your province or territory – a cost that will likely increase over time.[x]

One key role your attorney will play is in managing your finances to cover the costs of your care. For example, if you have a $1 million investment portfolio, your attorney will determine which of your investments must be liquidated to pay for care if your income is not sufficient to cover these costs, and how the portfolio will be managed to ensure that your best interests are met while still reflecting your long term objectives for your estate.

Although this paper's focus is on the importance of an attorney to protect your financial wellbeing, there will inevitably be some crossover with your personal care. If your attorney for financial matters is not the same person as for personal care, these people will need to work together closely to ensure your best interests are met. For example, your attorney for personal care is responsible for making decisions about your healthcare, shelter, clothing, hygiene and safety. If you are incapable and your attorney for personal care makes a decision to have your care provided in a long term care facility, your attorney for property will be called upon to ensure you have the financial resources to pay for the long term care facility.

Choosing Your Attorney

It may seem intuitive to appoint your spouse, your adult child or a close friend as your attorney. The decision on who to appoint may be even more important than choosing the Executor (called a Liquidator in Quebec) of your estate, since you will be living to experience the consequences should something go wrong as a result of your choice. As well, mismanagement of your assets during your lifetime could mean that the terms of your Will and estate plan are not carried out as you expected due to a diminished estate.

When selecting your attorney(s) you should therefore use the same due diligence process as you would use to select your other professional advisors such as your lawyer, notary, accountant or other trusted professional. In choosing an attorney, certain key factors should be considered, including:



- Your attorney's financial acumen
- Your attorney's location and ability to travel, if needed
- Your attorney's age and stage in life
- Your attorney's organizational skills
- Your attorney's potential for emotional bias

Will Your Attorney Have the Required Financial Acumen?

Your attorney is a fiduciary who must act diligently, honestly and in good faith, for your benefit alone. Depending on your province or territory of residence, the responsibilities of an attorney may include making expenditures on your behalf for your support and care and for any of your dependants, consulting with your supportive family and friends, managing your assets, keeping detailed records of all transactions involving the your property, and ensuring your tax returns are filed. These tasks can prove burdensome, particularly if your chosen attorney is inexperienced in managing finances. For a detailed listing of individual tasks, please see the Appendix.

There is a developing trend in provincial and territorial legislation that places more scrutiny on attorneys and their duties around record keeping and accounting, similar to consumer protection laws. While attorneys are held to high standards, these trends demonstrate that more time and effort may be required of attorneys to demonstrate that they are fulfilling their duties, with potential legal consequences if they cannot demonstrate this.

It is therefore critical to ensure that the person(s) you choose has the time to deal with the administration associated with acting as attorney, and has the aptitude to deal with legal responsibilities or potential liability involved in carrying out their duties as attorney.

How Far Away Does Your Attorney Live?

Your choice of attorney may not necessarily live in the same province or territory or even the same country as you do. Perhaps your family members have emigrated from their home country to pursue career opportunities in another part of the world. Parents and grandparents may live in one country, while their children and grandchildren (sometimes from multiple relationships and marriages) live in another.

If your attorney lives in a different jurisdiction than you, there may be additional risk due to the legal, logistical and administrative complexities in managing your affairs from afar. For example, your assets may be located in multiple jurisdictions around the world; you may own property in a number of geographic locations and divide your time between these homes. If this is the case, you will require Power of Attorney documents that are effective in each jurisdiction, as a "general" Power of Attorney prepared in one place may not be legally effective in another. They may have practical challenges, such as physical proximity, as well as compliance issues in carrying out their duties as your attorney. For example, if your attorney lives in the U.S., a financial advisor in Canada who is not registered under U.S. securities laws will not be authorized to

Consideration should therefore be given to the competing time pressures of children, a career and caring for aging parents if the person you are considering appointing as attorney may be a member of the Sandwich Generation when called upon to act.

give investment advice to, or take investment direction from, an attorney who is a U.S. resident.

Choosing an attorney who lives some distance away may also have an impact on the attorney's own career and stress levels, particularly if the attorney is also providing or arranging personal health care. Job absenteeism is also affected by the distance between an attorney or caregiver's home and the person for whom they are caring. A survey of Canadians age 45 and over who were providing care to a parent or parent-in-law showed that 13 percent lived in the same household, 46 percent lived in the same neighbourhood (within 30 minutes on foot or by bus), 20 percent lived in a surrounding neighbourhood or community (less than one hour by car), 15 percent lived one hour to less than half a day by car, and 7 percent lived more than half a day by car.[xi] As the intensity of the care needs increase, and more time is required to assist the care receiver, the travel time can become burdensome, especially in poor weather conditions or if there is a significant financial cost to the travel.

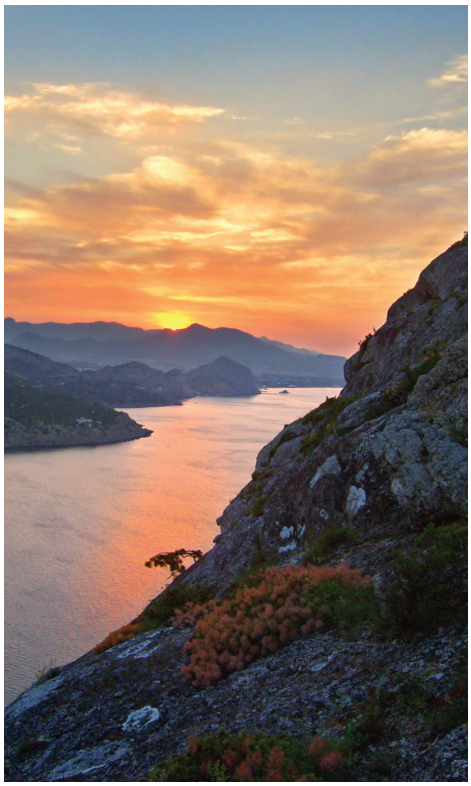
Will Your Attorney Have Time To Manage Your Affairs?

In some cases, an attorney's tasks span several years, and the level of care needed may escalate over time.

If you are considering an adult child as your attorney, consider whether he or she may be part of the "Sandwich Generation." The term Sandwich Generation is used to describe a group of people aged 30-50 years old who are handling the financial and emotional stress of caring for both their parents and their dependent children, while preparing for their own future stages of life. Entering into a period of their lives when they would normally start planning and saving for their own retirement in earnest, members of the Sandwich Generation are suddenly finding themselves spending time and savings not only caring for their children, but also caring for aging family members and even friends. People are marrying and having children later in life, meaning they may have financial obligations to children while at the same time having to care for their own parents. While families have always had to deal with the care of older parents and younger children at the same time, a number of factors have combined to make this the start of what's expected to be a more significant and enduring trend.

Consideration should therefore be given to the competing time pressures of children, a career and caring for aging parents if the person you are considering appointing as attorney may be a member of the Sandwich Generation when called upon to act.

You should also consider what will happen if the person you have appointed as attorney is not physically or emotionally well when the time comes to act as your attorney. If you still have capacity, then you can appoint another person to act on your behalf. However, if you do not have capacity, the co-named attorney or your alternate choice (if you have named one) will need to act. If you do not have an alternate or your alternate is also unable to act, someone may have to be formally appointed to manage your affairs.



Will Your Attorney Be Emotionally Biased?

If your attorney is related to you, they may have an emotional bias that prevents them from carrying out your wishes. Difficult family dynamics can also impact the decisions that are made by your attorney. When family members are attorneys, they may feel pressure from other family members or friends to act in a way that may not be consistent with what you would have wanted. If your attorney is emotionally vulnerable because of your incapacitated state, or prone to influence from their spouse or other family members, it may be difficult for them to act with the impartiality required of attorneys. Finally, your attorney can be in a potential conflict of interest if the spending for your care will affect their potential inheritance.

Appointing Multiple Attorneys

Given the abovementioned factors, you may wish to consider appointing more than one attorney. If you appoint more than one attorney, it is important to understand the difference between the various appointments you can make. For example, you can require that your attorneys act together ("jointly") or you can give your attorneys the flexibility of carrying out their duties separately or together ("jointly and severally"). Many people appreciate the inherent safety in having more than one decision maker acting together, as it reduces the chances that your assets will be mismanaged.

Requiring your attorneys to make joint decisions with respect to all your financial affairs may not suit your particular circumstances. You may therefore want to consider granting independent decision-making power to separate individuals for different tasks. For example, if spelled out in your Power of Attorney documents, you can arrange for one person to conduct day-to-day banking and one person to make investment decisions. You can also differentiate the roles by having one general Power of Attorney document and one limited Power of Attorney document. It is important to seek legal advice so that you understand what each attorney can do on your behalf alone, what actions must be taken jointly and how to deal with conflicting instructions.

Appointing a Trust Company as Attorney

For many reasons – including those above – some people choose a trust company to act as their attorney, a company licensed to provide this service.

Working with a trust company can bring confidence to your estate planning. You will have a written, signed agreement as to the duties that will be carried out on your behalf. While your family members may not be familiar with estate planning laws or terminology, a trust company's advice is timely and based on current estate planning requirements and regulations. Most trust companies, as providers of these services, can tailor a service package to your needs, comprising custody, recordkeeping and accounting, and support for the investment of trust assets.



A Growing Trend to Greater Accountability in Canadian Power of Attorney Legislation

Stories of disputes involving uses and abuses of Powers of Attorney and other abuse of seniors and the vulnerable are becoming more common place and evidence of the impact and effect can be seen everywhere from government advertisements to changes in legislation. The scrutiny applied to the administration of the property of others under a Power of Attorney will continue to increase in the future. Examples of this trend to greater accountability for attorneys can be seen in amendments to provincial legislation such as British Columbia's changes to the Power of Attorney Act. Mandatory reporting of abuse is also making its way into many provincial laws.

Under British Columbia's new legislation, your attorney may make gifts, loans and charitable donations that you would have made, but only up to a maximum of $5,000 and only if you will have sufficient property left over to meet your needs (and the needs of your dependents). In addition, the legislation now sets out the duty to account for your assets and liabilities, including an estimate of their value.

Although unlikely to pass into law in its existing form, the Protection of Vulnerable and Elderly People from Abuse Act (Powers of Attorney) was presented before the Legislative Assembly of Ontario in 2011. A noteworthy item was that the Bill proposed an unprecedented requirement that an attorney provides annual accounting to Ontario's Public Guardian and Trustee and, if requested, to the donor who appoints the attorney.

As well, the Bill proposed to create a register of attorneys containing, if the donor chooses to provide it, the name and address of the donor and the attorney, any restrictions on the attorney's authority, the date the attorney's authority took effect and the persons to whom the donor authorizes the Public Guardian and Trustee to disclose information.

While the changes enacted in British Columbia and proposed changes in Ontario might serve the intended purpose to protect vulnerable citizens, they will impose significant obligations on attorneys, who will need to be prepared.



Example of Senior Abuse by an Attorney

*Names have been changed and circumstances altered.

One 2011 case of senior abuse from eastern Canada demonstrates the value of a responsible attorney and the importance of due diligence in appointing one.

Henry* was the nephew of the victim, Samantha, and the beneficiary of her Will. In 2009, Henry obtained a Power of Attorney for property over his aunt's affairs. Samantha lived alone in her home and had a bank account with some savings. In March of that year, the aunt's house was transferred into joint tenancy with Henry. A doctor's report indicated that Samantha was suffering from a severe form of chronic dementia. Shortly thereafter, Henry placed his aunt into a private nursing care home, signing a contract as under the Power of Attorney. The care home only received three payments but Henry arranged no further payments for Samantha's care. Henry sold his aunt's house and took control of the proceeds. He removed the remaining funds from his aunt's bank account and then he himself moved to a different province. In addition to taking all the funds, Henry arranged to receive his aunt's Old Age Pension (OAP) and Canada Pension Plan (CPP) at his new address. Sadly, Henry made no further contact with the nursing home or his aunt. Samantha was left to languish in a private care facility, alone and without any family support. She had no money for basic personal care not covered by her room and board, including hair cuts, clothing, foot care and incontinence supplies.

Eventually, Samantha's situation came to the attention of the Public Trustee's office who was certified as her guardian. The Public Trustee commenced a civil lawsuit against Henry who was also charged with theft of his aunt's property. Henry entered a plea of "guilty", repaid the amount of the theft and was sentenced.

Protecting Yourself Against Senior Abuse

Based on average data, it is estimated that 4-10 percent of Canadian older adults experience some form of abuse.[xii] While senior abuse can include physical, verbal, psychological and sexual abuses, the most prevalent form of abuse appears to be financial abuse.[xiii]

Despite your best intentions, when you grant authority to another individual under a Power of Attorney, there is always the possibility that they may abuse it. Unfortunately, more and more people acting as attorneys are finding themselves embroiled in legal issues. Criminal liability may result if an attorney is found to have engaged in financial abuse or theft, punishable under section 331 of the Criminal Code of Canada, R.S.C. 1985, c.C.-46 (the "Code"). Under section 334 of the Code, theft over $5,000 is punishable by imprisonment.

In December 2012, the federal government passed legislation that provided for stiffer sentences for those who take advantage of older Canadians. *The Protecting Canada's Senior Act*, S.C. 2012, c.29 received Royal Assent on December 14, 2012, and came into effect 30 days later.

Your RBC Advisor's Role

No matter how seriously your chosen attorney takes their responsibility, your RBC advisor is here to help alleviate the burden. Your advisor can provide specific expertise to the attorney, manage ongoing administration such as bill payments and recordkeeping or, at the outset, help you find the right person for the job. Ultimately, a well-appointed attorney will bring peace of mind to you and your loved ones.

Your Power of Attorney should be reviewed and discussed with your lawyer or notary so you understand your attorney's powers and duties.

For more information on appointing an attorney, or with any estate planning questions, please speak with your RBC advisor who can arrange an introduction to an RBC Estate & Trust Services advisor.

This paper does not nor is it intended to provide financial, legal or tax advice, and should not be used or relied upon as a substitute for independent research or professional advice.

Checklist of Attorney's Duties

Many people consider it an honour to be considered as an attorney, and to be entrusted to the number of important duties as part of the role. From reviewing your Will to managing your banking, insurance and investments, the following list of duties, while not exhaustive, is significant enough to warrant special consideration for the person who will ultimately manage your affairs on your behalf.

The extent to which these duties should be performed by the attorney will depend on the circumstances of the donor of the Power of Attorney and, as such, not all may be applicable. If the donor is capable, the Attorney should follow the instructions of the donor as to which tasks should be completed on his or her behalf.

1. Locate and review the donor's Will and document any specific instructions concerning property and bequests
2. Notify all banks, brokers and financial institutions with whom the donor has business that you are acting as the donor's attorney; confirm whether the donor created any other Power of Attorney documents with them and redirect statements if necessary
3. Cancel debit card(s)
4. Cancel credit card(s) and return cards to issuers
5. Check Bank of Canada website for unclaimed balances in donor's name
6. Locate and document all original investment certificates, stocks, bonds, property deeds, etc.
7. Notify appropriate institutions and redirect annuities, pensions and registered funds
8. Review the suitability of the investment portfolio and any surplus cash, making any necessary and allowable adjustments to meet cash requirements
9. Identify and document all other personal assets
10. Notify Canada Revenue Agency, provide them with a copy of the Power of Attorney document and request a statement of account showing all outstanding taxes, refunds and installments paid to the current date
11. File any outstanding and ongoing tax returns and pay all income taxes owing
12. Notify the appropriate authorities and redirect CPP/QPP, OAS, Veteran's Pension Payments and GST/HST credits
13. Notify insurance companies or other institutions regarding auto, home, disability or life insurance that you are acting as the donor's attorney and redirect statements if necessary
14. Ensure adequate insurance for assets and upkeep of property
15. Set up disability insurance payments, if required
16. Cancel auto registration and insurance, if applicable, and collect any refunds
17. Investigate and record all debts owed by the donor
18. Arrange payment of debts with any surplus cash and obtain receipts
19. Create a complete list of the donor's assets and liabilities as of the date of your first action
20. Establish an ongoing list of acquisitions and dispositions made on the donor's behalf (i.e. money received, investments made, liabilities incurred or discharged)
21. Create a monthly budget consisting of all expected income and payments required to ensure the donor's immediate and ongoing financial needs can be met
22. Document (including assets used in calculation) any compensation taken for your attorney duties
23. Consult with the person acting as attorney for health care regarding health care, safety and shelter for the donor; obtain a written description of decisions made and make all necessary financial arrangements
24. If there is no named attorney for health care, obtain legal advice regarding the donor's current circumstances
25. Notify personal attendants, housekeepers, gardeners and other staff of your role as attorney, as advise as required
26. Initiate sale of assets if required
27. Cancel memberships and other subscriptions if required

[i] Public Health Agency of Canada, Health-Adjusted Life Expectancy in Canada: 2012 Report, 2012. Available at <http://www.phac-aspc.gc.ca/cd-mc/hale-evas-eng.php>, page 38. [Accessed June 10, 2012].

[ii] Lawyers' Professional Indemnity Company (LAWPRO), "Survey: More than half of Canadians do not have a signed will," News Release, May 7, 2012. Available at: <http://www.lawpro.ca/news/pdf/Wills-POAsurvey.pdf> [Accessed June 10, 2013].

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[v] Statistics Canada, Census of Population, 2011. Available at: <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-311-x/98-311-x2011001-eng.pdf> [Accessed June 10, 2013].

[vi] HRSDC calculations based on Statistics Canada. Estimates of population, by age group and sex for July 1, Canada, provinces and territories, annual (CANSIM Table 051-0001); and Statistics Canada. Projected population, by projection scenario, sex and age group as of July 1, Canada, provinces and territories, annual (CANSIM table 052-0005). Statistics Canada, 2011. Available at: <http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=33> [Accessed June 10, 2013].

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[x] RBC Insurance, Long Term Care In Ontario, 2010.

[xi] Statistics Canada, Catalogue no. 11-008-X, Caring for a parent who lives far away: The consequences, January 26, 2010. Available at: <http://www.statcan.gc.ca/pub/11-008-x/2010001/article/11072-eng.pdf> [Accessed June 10, 2013].

[xii] National Seniors Council. Report of the National Seniors Council on Elder Abuse. 2007. Available at: <http://www.seniorscouncil.gc.ca/eng/research_publications/elder_abuse/2007/hs4_38/hs4_38.pdf>, page 5. [Accessed June 10, 2013].

[xiii] Ibid, page 8.



RBC Wealth Management

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