The Navigator

RBC WEALTH MANAGEMENT SERVICES

Power of Attorney – Common-law Provinces only

A Power of Attorney (POA) is an excellent tool that should form a key part of your financial planning. It is most important in case you should become incapacitated and cannot perform for yourself your normal daily tasks, such as paying bills and managing your investments. However, when you grant authority to another individual under a POA, there is the possibility that the authority you give may be abused, resulting in the mismanagement and depletion of your assets. To minimize this kind of risk, it is important to understand how the POA is created and the nature of the authority you are giving to your attorney. This article is intended to provide general information on issues relating to the preparation and use of POAs in common law provinces and territories and does not apply to residents of Quebec. It is not intended to be legal advice and should not be relied upon as such. Please speak with your legal advisor before taking any steps on the matters referred to in this article.

Introduction

When you consider granting a POA, there are several questions to consider that may help your attorney(s) carry out his or her duties.

Key questions to answer include:

- Who would be an appropriate attorney(s)?;
- Do you wish to appoint multiple attorneys and if so, do you want them to work together, separately, or together and separately?;
- Do you want to name an alternate/substitute attorney(s) in the event your primary attorney(s) cannot fulfill their duties?
- Are you executing a POA to revoke a previously executed POA or to preserve its effectiveness? [or would you like this POA to co-exist with the previous one, if any?]
- Do you want to compensate your attorney(s)? If so, what should the compensation model be?;
- Do you want your attorney(s) to have the option to delegate his or her authority?

If you do not address these issues in your POA, your attorney(s) may face challenges carrying out his or her duties and third parties may be reluctant to accept direction from your appointed attorney(s).

There are certain things which you cannot authorize your attorney(s) to do. These include, for example, designating beneficiaries for your registered retirement savings plan (RRSP), registered retirement income fund (RRIF), tax-free savings account (TFSA) or insurance policies and executing a Will on your behalf. There are also some transactions that your attorney(s) generally cannot undertake on your behalf unless you expressly authorize him or her in the POA. These include making gifts or loans and delegating investment powers to a portfolio manager or investment counselor. We discuss these in greater detail later in this article.

This article will discuss these issues in more detail and provide suggestions, where appropriate, to help you instruct your legal advisor when you create your POA. We will examine what your attorney's duties should be and how much authority to give him or her. We will illustrate some of these points using the example of John and Marian Duncan, a married couple in their early sixties who live in Toronto, Ontario. John has three adult children from his first marriage. His daughters, Joan and Karen, live in Ontario and his son, Michael, lives in California. John and Marian plan to retire in the next few years and hope to spend part of the summers and winters at their chalet in Whistler, British Columbia They recently met with their financial advisor and lawyer to review their assets which include an investment holding company. As part of their estate plan, their lawyer advised them to update their Wills and prepare Powers of Attorney.

What is a Power of Attorney?

A POA is a legal document in which one person, commonly referred to as a donor or grantor, gives another person(s), referred to as the attorney(s), the power and authority to act on the donor's behalf. In performing his or her duties under a POA, an attorney(s) must always adhere to the fundamental principle that he or she is a fiduciary and must act in the best interests of the donor.

A POA is a legal document in which one person, commonly referred to as a donor or grantor, gives another person(s), referred to as the attorney(s), the power and authority to act on the donor's behalf.

A POA for property is used to allow the attorney(s) to make decisions about financial and property matters. A different legal document may be used in some provinces and territories to make personal care decisions. In some provinces, you can execute one document which will contain your authority for an attorney to act on your behalf in relation to financial and property matters as well as personal care matters. However, this article focuses on issues relating to POAs for financial and property matters.

Creating a POA

We strongly recommend that you have a qualified legal advisor prepare your POA. This helps ensure that you create a POA which contains the clauses necessary to enable your attorney(s) to effectively carry out your wishes. Generally, a POA must meet certain statutory requirements to be valid. These requirements may differ from one jurisdiction to another. The general requirements for the creation of a POA are:

- It should be in writing and signed by the donor in the presence of one or more witnesses depending on the requirements of provincial laws; and

- The donor should have reached the age of majority in the jurisdiction where he or she lives and have the requisite mental capacity.

Several jurisdictions have limitations regarding witnesses. Generally, the following individuals should not witness the signing of a POA:

- The attorney(s) or the spouse of the attorney(s);
- The donor's spouse or common-law partner; and
- A child of the donor.

Other restrictions regarding witnesses may apply, depending on the province and other factors.

A common clause found in many POAs gives the attorney(s) power to do anything that the donor could do if capable. Although this may be the intent of the donor, the operation of certain laws may limit the attorney's authority and powers. For example, your attorney(s) cannot delegate his or her authority unless specifically provided for in the POA or expressly allowed by statute. Provisions to address these limitations may be included in the POA.

A qualified legal advisor helps ensure that you create a POA which contains the clauses necessary to enable your attorney(s) to effectively carry out your wishes.

Any powers you give your attorney(s) must not override the fundamental principle that the attorney(s) is a fiduciary and must act in your best interests and avoid conflict with those interests.

Types of POA

There are generally two types of POA:

- A POA for property; and
- A POA for personal care.

As required under the legislation, a POA for property should contain a clause providing that the power granted to an attorney will continue notwithstanding that the donor loses mental capacity. This is known as an "Enduring" or "Continuing" POA. In the absence of such a clause, the power granted to an attorney over property is extinguished if the donor loses mental capacity. This can be a critical issue as it is precisely at the time that you demonstrate mental incapacity that you will need an effective POA so someone is authorized to act on your behalf.

Consider when and/or under what circumstances you want the POA to take effect. You may not want it to become effective until you are found to be incapable of managing your own finances. Alternatively, you may require immediate assistance if you are not available or do not wish to act personally, or you become physically impaired. In that case you may want

the POA to take effect as soon as you execute the document. Provided you are capable and third parties are aware of them, your instructions and decisions will take precedence over those of the attorney(s).

If you wish to have the POA take effect when a specified event occurs, ensure your lawyer is aware of your intention and the trigger event. A power of attorney containing such a precondition is known as a "Springing" POA. If you choose to have it come into effect, for example, only when you become mentally incapacitated, it is a good idea to instruct your lawyer to identify in the POA the person or organization responsible for determining your competence and stipulate an appropriate dispute resolution mechanism in case a dispute arises. Otherwise, a formal capacity assessment may be required.

As this is John and Marian's second marriage, it is important to be clear about the 'trigger' event that will bring each of their POAs into effect. This can help to avoid potential disputes between John and Marian and John's children.

What is capacity?
It is important to understand the concept of "capacity." This can be broadly defined as an individual's ability to make decisions, including investment decisions and to realize what the outcome of those decisions will be. In some cases, it can be difficult to identify medical conditions which can affect an individual's legal capacity. If it becomes necessary to determine your legal capacity, a medical opinion or capacity assessment will usually be involved. Those individuals and organizations that are dealing with you and/or your attorney will generally rely on a letter, signed by a licensed medical doctor, which contains a statement that you are no longer able to make your own investment decisions.

Capacity is a critical concept. You must have legal capacity at the time you execute your POA for the document to be valid. If, on a later date, it is determined that you no longer have legal capacity, the authority given in your POA will be extinguished unless the POA contains an express provision that the POA will remain valid even if you lose capacity. If your professional advisor suspects that your ability to make decisions is diminishing, he or she should take appropriate steps for your benefit, to ensure that you do not make decisions which could be contrary to your best interests. This could include requesting a determination of competence from the person or organization you specified in your POA.

Appointment of attorneys

Multiple attorneys
In creating your POA, consider how many attorneys you wish to appoint and who they will be. If you appoint more than one attorney, it is important to understand the difference between the various appointments you can make. This will help you decide whether to give your attorneys the flexibility to carry out their duties separately or whether to restrict their power by only allowing them to act together. You may feel comfortable knowing that signatures from all attorneys will be required to make decisions on your behalf. Having all signatures reduces the chances that your assets will be mismanaged. You may wish to consider how often decisions will need to be made which cannot wait for the additional signatures to be provided.

Appointing attorneys who can act jointly and separately, or 'jointly and severally' means that your attorneys have the authority to act together but any one of them may also act alone. If you appoint more than one attorney and you want them to act together, your lawyer can specify in the POA that the attorneys must act jointly. If you want your attorneys to be able to act either together or separately then your lawyer can specify that they act jointly and severally. Generally if you appoint

two or more attorneys, they are required to act jointly unless the terms of your POA or the relevant statute provide otherwise.

POAs are governed by provincial/territorial laws so the legislation in the province or territory where you live governs the way in which you can appoint multiple attorneys. For example, while many provinces and territories provide the alternate choices of appointment previously discussed, in Manitoba, Powers of Attorney Act provides that attorneys can either be appointed to act jointly or 'successively' rather than jointly and severally. Appointing attorneys successively means that the attorneys are required to act alone, and in the order in which their names appear on the POA. For example, the second named attorney only makes decisions when the first named attorney cannot or will not make decisions. In Saskatchewan, the Powers of Attorney Act, provides that attorneys can be appointed to act jointly, severally (each attorney has a separate set of powers and acts individually) or successively.

Consider how many attorneys you wish to appoint and who they will be. If you appoint more than one attorney, it is important to understand the difference between the various appointments you can make.

In the case of John and Marian, they have both been married previously and John has three adult children from his first marriage. When considering who to appoint as his attorney, John may wish to appoint Marian and/or one or more of his children. Since Marian is his second wife and not the mother of his children, John may not wish Marian to have sole authority over his finances to the exclusion of his children. He could specify that his attorneys act jointly and severally which may help avoid delays if one of the attorneys is not available when a decision is needed. On the other hand, such separate authorities may invite conflict unless there is a high level of trust and communication among the family. In Marian's case, she has no children of her own but she may have assets in her sole name and members of her own family who would be suitable to act as her attorney. Depending on the nature of her assets and her relationship with John's children, appointing an independent attorney may help avoid any potential conflicts of interest. John and Marian know their relationship and those relationships with their family the best and should openly discuss concerns with their legal advisor so that their powers of attorney are appropriately set up for them.

Non-resident attorneys

When appointing an attorney(s) consider whether the individual(s) you choose live(s) in your jurisdiction or in a different jurisdiction. Your attorney(s) may face practical challenges in carrying out his or her duties if he or she lives at a distance and there may also be compliance issues relating to their ability to give instructions to your financial advisors. For example if your attorney(s) lives in the United States

of America (U.S.), a financial advisor in Ontario, who is not registered under U.S. securities laws, will not be authorized to give investment advice to or take investment direction from an attorney who is a U.S. resident. In such a case your attorney(s) may not be able to act on your behalf at a time when you are incapacitated. Consider the practical issues that will enable your attorney(s) to perform his or her duties. If you wish to appoint an attorney(s) who lives in a different jurisdiction from you, it may be practical to appoint an attorney(s) who lives locally to act jointly and severally with the 'long-distance' attorney(s). This may help ensure that all tasks can be carried out efficiently.

John's son Michael lives in California. If John wishes to appoint Michael as an attorney, he should consider appointing him together but "severally" with one or both of his sisters so that a local attorney is available to make decisions at short notice. This will also avoid the situation where an advisor in Ontario is not authorized to take instructions from a US resident's attorney for the reason above-described.

Compensation

Your attorney(s) may receive compensation for acting on your behalf. However, he or she should only be compensated if the POA provides for this or, to the extent that it is permitted by law or directed by the courts. If the attorney(s) is acting in a professional capacity, the POA should specify the appropriate compensation. It should also state whether compensation is to be paid for performing both professional and non-professional services. In Ontario, the regulations to the Substitute Decisions Act have prescribed a scheme for compensating an attorney(s).

The standard of care that is required of an attorney(s) may be dictated by whether or not he or she is compensated for his or her services. An attorney(s) who does not receive compensation for his or her services is expected to demonstrate the skill, care and diligence that an ordinarily prudent person would in managing his or her own affairs. An attorney(s) who is compensated for his or her services may be subject to a higher standard. The attorney may be expected to demonstrate the standard of the care, skill and judgment which would be expected of a professional financial and property manager. An attorney(s) should therefore be aware that once he or she receives compensation for his or her services, he or she has to be able to discharge his or her obligation based on a higher standard of care.

Multiple authorizations

Generally a new POA revokes an old POA that pertains to the same subject matter except in cases where the POA expressly provides for the existence of multiple POAs. Notwithstanding this fact, written notice should generally be provided to third parties whenever a POA ceases to be effective. When executing a POA, it is a good idea to be cautious and check whether you had executed a previous POA and whether there is language in the new POA that would prevent it from revoking the earlier POA.

Foreign POA

Generally your POA will cover your property situated in the province or territory where you live. As a donor you may want to know whether a POA executed in your home province or territory will be valid for assets in another jurisdiction. The rules governing the requisite formalities that constitute a valid POA may differ from jurisdiction to jurisdiction, so if you have property situated in other jurisdictions, consider executing a POA for each jurisdiction where assets may be situated. If you choose to create a POA that will govern assets, such as real estate, situated in another jurisdiction, ask your lawyer if the POA will be valid in the other jurisdiction. As John and Marian have a property in Whistler, British Columbia, they should ensure that a POA they execute in Ontario

complies with British Columbia law and that the provincial formalities, for example, filing their POA with the British Columbia Land Titles Office, are observed so that their Ontario POA can be used in British Columbia to facilitate transactions with their Whistler property. Taking into account the above scenario, as of September 1, 2011, a POA which is intended to apply to the property of a resident of British Columbia must, if signed in another province, be accompanied by a certification from a lawyer qualified to practice in that other province, known as the Certificate of Extrajurisdictional Solicitor, attesting to the validity of the POA.

Termination of POA

As a donor you may want to know whether a POA executed in your home province or territory will be valid for assets in another jurisdiction.

Your POA will terminate on your attorney's death, unless you appoint a substitute attorney for this situation. Depending on the type of POA you prepare, your POA can also terminate in a number of other circumstances. This could be, for example, when you or your attorney(s) becomes mentally incapacitated, are declared bankrupt, if your attorney(s) resigns, or if a triggering event specified in the POA occurs. Note that a POA does not automatically terminate on marriage or divorce unless it is revoked except in the province of British Columbia where since September 1, 2011 separation from the spouse or common law partner who is attorney now terminates the POA.

As long as you have mental capacity, you may remove the attorney(s) at any time by revoking the attorney appointment contained in the POA. To revoke the attorney appointment, send written notice to the attorney(s) and to all parties concerned. This is important because, at law, a third party, which could be individuals or organizations with which your attorney deals, is entitled to rely on the authority of the attorney(s) until they receive notice otherwise. Until the third party receives notice, they will be protected if you or your estate makes claims against them. You or your estate will remain bound by any transaction that the attorney(s) has made with a third party.

If you have only appointed one attorney, consider naming an alternate attorney in your POA to act on your behalf in the event that your original attorney dies, loses capacity, becomes bankrupt, or is no longer willing or able to act on your behalf. If you appoint multiple attorneys, your lawyer can include provisions in the POA that will allow the remaining attorneys to continue to act if one attorney is no longer willing or able to act. John and Marian may wish to appoint each other to act as attorney and as an alternate appointment, one or more of John's children, depending on their ability and willingness to take on these responsibilities. In the event that either John or Marian are unable to continue to act at some point in the future, John's children could continue. Depending on the

Duties and powers of the attorney(s)

When you prepare your POA, consider the range of tasks that you may want your attorney(s) to perform. There are limits to the powers you can give to your attorney(s) and some powers can only be given to your attorney(s) if you expressly include them in the POA itself. The attorney(s) must always adhere to the fundamental principle that he or she is acting in a fiduciary capacity and their actions must be in the best interests of the donor. Other common law principles also apply to the fiduciary relationship that exists between you and your attorney. These are implied by law and do not need to be expressly included in the POA. For example, the common law requires that the attorney avoids conflicts of interest and acts in good faith. Bear this in mind when deciding the terms on which to grant a POA and the contingencies for which you wish to empower your attorney(s).

If you wish your attorney(s) to have the ability/authority to perform any of the following tasks, you generally need to include an express provision in your POA that authorizes them to:

- delegate investment powers to a portfolio manager or investment counselor;
- make gifts or loans to third parties including charities;
- implement estate planning strategies such as settling an inter vivos trust, effect an estate freeze and transfer assets in your sole name to a joint account with right of survivorship; and
- make certain beneficiary designations on RRSPs, RRIFs, TFSAs and/or insurance policies.

family circumstances, Marion may wish to appoint an independent alternate attorney if she feels that appointing her step-children could potentially cause a conflict of interest.

Delegation of investment powers/ decisions

There is no common law rule that authorizes an attorney(s) to delegate his or her authority to another person. However, if you wish to give your attorney(s) such a power, there are ways you can do this:

- You have mental capacity and provide written express instructions to your attorney(s),
- You provide express powers in your POA authorizing your attorney(s) to delegate his or her investment powers to a portfolio manager or investment counselor or,
- Legislation in the province or territory where you live permits you to delegate your investment powers.

For example, in Alberta and British Columbia, provincial legislation expressly permits an attorney(s) to delegate his or her investment powers to an agent in AB and to a qualified investment specialist in BC. In all other provinces and territories, the donor of a POA will need to include express powers to delegate in the POA if the donor wishes the attorney(s) to have this authority.

If the donor of the POA opened a discretionary account, that is, an investment account under which the discretionary authority is entirely delegated to the advisor, prior to becoming incapacitated, the discretionary arrangement can continue as the attorney(s) will take the donor's place. However, if you wish your attorney(s) to have the authority to open a discretionary investment management account on your behalf, consider including a provision in your POA that permits the attorney(s) to delegate, sometimes sub delegate, his or her investment authority.

When opening a new discretionary account on your behalf, your attorney may also be required to develop an Investment Policy Statement (IPS) on your behalf based on a number of factors including your investment preferences, risk tolerance and time horizon. Ask your advisor if you should consider including an express power to develop an IPS in your POA. Your attorney must make his or her decisions on your behalf with your best interests in mind, so your IPS should always reflect your preferences and not those of your attorney.

Talk to your legal advisor about whether you will need to include a power to delegate investment authority in your POA in order to ensure that your accounts are managed effectively if you are incapacitated. This can be particularly important if you appoint an attorney who is a less experienced investor than you are. However, before you decide whether to include such a power in your POA, your first decision should be whether investing in a discretionary account will be right for you. Your attorney must always exercise his or her powers in accordance with your best interests, so give some thought to how you would like your attorney to make decisions on your behalf.

If you choose to include a power to delegate investment authority, your lawyer can advise you about the appropriate words to include in the document. A properly worded power to delegate investment authority in your POA gives your attorney valid authority to delegate investment decisions to another party, such as a portfolio manager or an investment counselor. The investment decisions they make should be appropriate for you and made with your best interests in mind. Here is some sample delegation language for your POA that you may wish to discuss with your lawyer:

"Where my attorney deems it advisable to do so, my attorney may engage or terminate the services of one or more investment dealers, investment counselors, portfolio managers or any other registrant under securities legislation (hereafter referred to as an "Investment Advisor") to advise the attorney in respect of the investment, reinvestment and disposition of my investments. My attorney may delegate to such Investment Advisor the discretion to manage all or any part of my investments, subject to such supervision and upon such terms and conditions, including the ability of such investment advisor to sub-delegate and further delegate such discretionary powers as the attorney deems advisable."

If you wish to authorize your attorney(s) to open a discretionary investment management account that uses fourth party investment managers, this will require an additional level of delegation, sometimes called 'sub-delegation'. You can expressly provide the authority to do this in your POA.

Making gifts or loans to third parties

Generally, your attorney may only make gifts or loans to a third party if this power is expressly provided for in the POA and if the gifts or loans made are based on your previous practice and intentions. If you wish to restrict your attorney's ability to make gifts or utilize such credit vehicles as may be available to you, include appropriate wording in your POA. In some provinces, legislation prescribes the total value of all gifts, loans and charitable gifts that can be made by your attorney in a year without court authority.

Talk to your legal advisor about whether you will need to include a power to delegate investment authority in your POA in order to ensure that your accounts are managed effectively if you are incapacitated.

Transferring the donor's assets into a joint account with right of survivorship

One frequently used way to minimize probate taxes on death is to transfer assets from a sole account to an account that is joint with the right of survivorship. This strategy is more complicated than it appears and can involve numerous potentially serious financial consequences. It should not be undertaken without professional legal and/or tax advice. A financial institution will not permit your attorney(s) to execute such a transaction on your behalf unless your POA specifically authorizes this transfer or ownership. If you are mentally competent, your financial institution will require your consent to the transaction. Assets in a joint account with right of survivorship pass to the surviving joint tenant on the death of the other joint tenant, so give careful thought to this matter before providing express authority to your attorney(s) to undertake such transactions.

If you have assets in a joint account and have appointed someone other than the joint account holder as your attorney, there could be a situation where both the joint holder and your attorney are authorized to make decisions about the account. To avoid conflict in such a situation, talk to your advisor, attorney and the other joint account holder about how the account will be managed once the POA comes into effect.

Making or changing beneficiary designations on RRSPs, RRIFs, TFSAs and/or insurance policies

The courts have held that the act of making a beneficiary designation or changing an existing designation is a testamentary disposition and exceeds the authority of an attorney. As such, generally your attorney cannot make a beneficiary designation on your behalf. However, you can include powers in your POA to confirm the ability of your attorney to appoint a beneficiary when your RRSP converts to a RRIF. The power does not authorize the attorney to appoint a different beneficiary. BC law has been changed to allow an attorney to change an existing designation if the court authorizes the change, renew, replace or convert an existing designation, as long as the beneficiary remains the same, or designate the estate of the donor as the beneficiary where no existing beneficiary is named.

You can give your attorney(s) the authority to make certain estate planning decisions on your behalf, such as settling an inter vivos trust, or implementing an estate freeze, by including these powers in your POA.

Implementing estate planning strategies such as an estate freeze or settling an inter vivos trust

You can give your attorney(s) the authority to make certain estate planning decisions on your behalf, such as settling an inter vivos trust, or implementing an estate freeze, by including these powers in your POA. Such powers could allow your attorney(s) to effect an estate plan on your behalf, for example, to minimize income or probate taxes at death.

As the attorney(s) is acting in a fiduciary capacity, the attorney(s) needs to ensure that the interests of the donor are protected and that the donor will not be deprived of funds needed for his or her care. Before engaging in any estate planning, the attorney(s) should consider whether the strategy benefits the donor; reduces the future or present value of the donor's estate; allows the donor to resume control over the property if he or she regains capacity; interferes with the donor's property to the least possible extent; and is consistent with the donor's Will. The attorney(s) also needs to consider whether this strategy is necessary or advantageous to the donor.

If the strategy employed by the attorney(s) is challenged and/or reviewed by the court, it may not receive court approval if it will deplete the

deceased's estate or benefits someone other than the donor. An example of this would be where the attorney(s) settles an alter ego trust with the remainder interest in the trust, on the death of the donor, going to a beneficiary other than a beneficiary of the donor's estate, as stipulated in their Will.

Even if the POA provides the attorney(s) with the authority to engage in estate planning, it is wise for the attorney(s) to seek court approval before doing so.

Corporate issues/considerations
If you or your attorney has a corporation, you need to consider the following matters when creating your POA:

Acting as a director
A POA gives authority to your attorney to step into your shoes as the owner of any shares, and allows him or her to sell, transfer or vote on the shares on your behalf. A POA does not, however, give your attorney authority to step into your shoes and act as a director of a corporation. To become a director and act in that capacity, your attorney, in his capacity as a shareholder under the POA, must elect himself or herself to be the director. If you are not the sole shareholder of the corporation, your attorney will need the consent of other shareholders to be elected as director.

John and Marian's attorney(s) will need to elect himself or herself as director of their investment holding company in order to make decisions for and deal with the corporation.

When including powers in your POA, ensure that the appointment of your attorney(s) under a general POA does not lead to an unintended association of your corporation with a corporation controlled by the attorney(s).

Association issues/considerations

If you give your attorney(s) broad powers that include the ability to exercise voting rights over your corporate shareholding, Canada Revenue Agency (CRA) may deem that the attorney(s) is the owner of the shares unless the exercise of the voting rights is contingent on the death, bankruptcy, or permanent disability of an individual. CRA has held that where a donor gives an attorney(s) the authority to vote shares of a corporation legally controlled by the donor, the corporation would become associated with any corporation controlled by the attorney(s). This association of two corporations may have unintended tax consequences. The corporations may be required to share the small business deduction limit and this can reduce the tax benefit from which one of the corporations could have benefited. When including powers in your POA, ensure that the appointment of your attorney(s) under a general POA does not lead to an unintended association of your corporation with a corporation controlled

by the attorney(s). You can minimize the chance of this happening by providing that the POA will only take effect in the event that you are permanently disabled.

Operational issues/considerations

As a client of RBC, you may have several relationships depending on your personal financial situation (e.g. Royal Bank of Canada, RBC Dominion Securities, RBC Insurance). While all these are considered affiliates of RBC, it is important to remember that they are distinct and separate legal businesses. If you have signed an RBC Royal Bank POA document provided by your bank branch to authorize your attorney to carry out banking transactions, your attorney will not be able to use this document to act on your behalf with other legal entities within RBC Financial Group.

A carefully drafted POA can help protect your interests and ensure that your instructions are carried out if you are incapacitated or need someone to act on your behalf.

Your attorney will need to provide a notarized copy of a POA to each legal entity within the RBC Financial Group with which he or she deals. From a privacy perspective, if you are interested in allowing all your RBC team to share general information among themselves, you will need to talk to your advisor about documentation requirements that will allow this access. You may also wish to include direction in your POA as to whether your attorney has authority to terminate your relationship with one of your advisors or transfer your assets to another financial institution. If you do not wish your POA to have these broad powers, your lawyer can advise of the appropriate wording to include in your POA to restrict your attorney's ability to make certain decisions. It may also be important to ensure that the POA has the flexibility to deal with unknown future circumstances. This could include the power to appoint more than one advisor in the event that an advisor moves, retires or dies.

Conclusion

A carefully drafted POA can help protect your interests and ensure that your instructions are carried out if you are incapacitated or need someone to act on your behalf. Your attorney(s) must keep in mind the principle that he or she is a fiduciary and must exercise his or her power in your best interests. If the financial institution dealing with your attorney(s) is concerned that the attorney(s) is not acting in your best interests, it may ask you, rather than the attorney, assuming you are legally competent, to sign off on withdrawals from your accounts, or other transactions.

Although it is reasonable to assume that you would not intentionally appoint an attorney(s) who would act in a manner contrary to your

best interests, this may occur for a number of reasons. An attorney(s) may abuse his or her powers inadvertently because the attorney(s) does not understand the nature of his or her obligations or because the attorney(s) become(s) involved in situations where there is a conflict of interest between the donor and the attorney(s). There are also, unfortunately, situations where the attorney(s) willfully commits a breach of trust. Due to the potential for abuse of authority arising from a POA, it is a criminal offence under the Criminal Code of Canada for an attorney(s) to steal assets that are entrusted to him or her. Your attorney(s) should be aware that the penalty for such theft is imprisonment for a term not exceeding ten years if the theft involves an amount in excess of five thousand dollars. If the theft involves an amount less than five thousand dollars, the penalty is imprisonment for a term not exceeding two years.

Your attorney(s) should also be aware that when he or she presents a POA to a financial institution, the financial institution may make reasonable enquiries to determine whether the POA is fraudulent or invalid, or whether the attorney(s) is engaged in illegal acts involving the assets under his or her care. As a result of these enquiries, the financial institution may refuse to facilitate certain transactions requested by the attorney(s). These enquiries are important for your protection and ensure that the financial institution is not negligent as financial institutions owe a duty of care to their clients and must ensure that their employees are reasonably skilled.

In light of the above comments, you and your attorney(s) should know that in general, unless the POA expressly gives your attorney(s) the power to do something, or authority is provided by a court order, a financial institution may refuse to allow your attorney(s) to proceed with some tasks. These may include: transferring funds from your account to a joint account with your attorney(s); transferring funds from your personal account to your attorney‘s account; allowing your attorney(s) to withdraw funds from your account for his or her personal use; and allowing your attorney(s) to designate a beneficiary. You can minimize the risk that the powers you grant will be abused by naming more than one attorney and/or providing that the POA does not become effective until some specified event occurs, such as your loss of mental capacity. In the latter case, as previously mentioned, you may wish to provide details in the POA of the individual or organization responsible for determining when the triggering event has occurred, together with a dispute resolution mechanism in the event that the attorneys cannot reach a consensus.

Your advisor is aware that you are the client, even when he or she is receiving instructions from the attorney you have appointed. Your advisor and attorney will work together to ensure that the actions they take on your behalf are in accordance with the authority you provide in your POA and are in your best interests.

When drafting their POAs, John and Marian Duncan should consider how the persons appointed in their POAs will work with the executors they have chosen for their respective Wills. By carefully coordinating these appointments with their estate plans and having their documentation properly executed by their professional legal advisors, they will benefit themselves and their families in the event that incapacity occurs at some point in the future. This can help to avoid unnecessary stress and expense at what can be a difficult time and ensure that their wishes are carried out.

› Please contact us for more information.