

Planning for incapacity

ESTATE PLANNING

At some point in your life, you may lose the ability to fully care for yourself. This loss may result from an accident, an illness or from some other cause. It may last for a short period of time or it may be permanent. Finally, you may lose the ability to care for yourself to the extent that you are mentally or physically incapacitated.

When you are incapacitated, your life is severely affected. You are not able to make or attend to the many decisions that impact your well-being. Those same decisions may also impact those who depend on you, such as your family members. As a result, your financial and family affairs, and even your health, may suffer.

During your incapacity, what you need is a person to make decisions for you. Further, you also need that same person to act on your behalf and carry out the decisions they have made. In legal terms, you need a person to act as an agent¹ for you during your incapacity.

Agent for Financial Affairs

At law, you can appoint an agent to handle your financial affairs. You do this by setting out in a written document (a deed²) the person you want to be your agent. Such a deed allows you to appoint someone to manage your financial affairs on your behalf which can take effect even when you still have capacity and also when you lose capacity. In some provinces the legislation states that an agent loses the authority to act when a person becomes incapacitated, unless there is specific wording that indicates that the authority continues even during incapacity. As such, it is very important that you consult with a lawyer to have the document drafted with accurate wording that ensures your agent can act, or continue to act, once you become incapacitated.

You can limit your agent's authority to act by indicating that the agent can only begin acting when you become incapacitated. This is often referred to as a "springing power of attorney"³.

Remember that your agent for financial affairs no longer acts once you have died. Your executor takes over your financial affairs as part of handling your estate. However, nothing prevents you from naming, if you so choose, the same person as both your agent and your executor. Your agent and executor differ in terms of their roles and when they may act.

1 We are using the term agent as general term for the persons being appointed. Terminology varies among provinces.

2 In Quebec, the mandate in case of incapacity.

3 In Quebec, the rules concerning the coming into effect of a mandate in case of incapacity are different. Please refer to the following subsection.



In Quebec, the mandate in case of incapacity only takes effect when the incapacity is declared. The mandatary must have the mandate homologated, that is, the court or a notary must confirm the incapacity with the help of a medical assessment.

If you have also signed a general power of attorney, it ceases to be valid when you become incapacitated or after the court declares the incapacity. In Quebec, the mandate in case of incapacity should not be confused with the power of attorney. The power of attorney only concerns property, unlike the mandate which can also affect the protection of the person. The general power of attorney is a document by which you authorize a mandatary to perform certain administrative acts or others of greater importance. It can be notarized.

The power of attorney will take effect upon your decision and you can terminate it at any time. It ceases to be valid when you become incapacitated or after recognition of the incapacity by the court. It is then that the mandate in case of incapacity takes effect.

Choosing a financial agent

There are some important qualities that an agent for financial affairs should have at a minimum: they should be trustworthy, financially astute, compassionate, and diligent, to name a few. Choosing your agent requires as much thought and care as you give to choosing your executor or your children's guardian. Your agent's decisions will have a direct and immediate impact on your life and the lives of your loved ones. Your spouse or another family member is often a good choice for an agent. Or, you may choose a trusted friend to act for you if family members are unsuitable or unavailable. Also, some trust companies will act as your agent in certain situations. Having more than one person act as your agent is also possible. If you use multiple agents, clearly set out in the deed if they are to act jointly or if they can act alone. Lastly, choose an alternate person to act as your agent, just in case your first choice is not able to act.

Your agent for financial affairs may receive a fee for being an agent. The amount an agent is paid is not well established. Payment practises vary from region to region. Some professionals suggest that an agent's fee should be similar to what a trustee is paid. Others suggest that an agent's fee can vary depending on the types of tasks that he or she performs. A professional can advise you on the typical fees that an agent receives in your region.

Powers of a financial agent

In the deed that names your agent^{1,2}, you should set out what your agent can do. In other words, you should set out what "powers" your agent has in acting for you. The powers can be very broad and discretionary. This would allow your agent to attend to all of your financial affairs. As well, such powers

allow your agent to deal with unexpected events without first getting court approval. However, the powers can be limited. Your agent can only attend to those financial affairs that you have set out in the deed. You may restrict your agent's powers for many reasons. Some reasons may include:

- You have several agents acting for you and each has their own area of responsibility.
- You have certain financial arrangements that you do not want altered.
- You have concerns about giving your agent broad powers and want court supervision of some financial matters.

Lastly, keep in mind that provincial laws limit the powers of your agent in some matters. For example, most provinces do not allow your agent to create a new will for you or make other testamentary decisions such as changing beneficiary designations.

Responsibilities of a financial agent

While the responsibilities of the agent are outlined in the deed, it is important to remember that the agent has a fiduciary responsibility to act for the person. The agent should keep detailed records of all transactions to support the flow of any funds received or spent while acting on the person's behalf.

Agent for Personal Care

The idea of having an agent for personal care is a recent advance in our laws and culture. Many of us are now much more aware of our personal care and how it affects our quality of life. As a result, we want greater control over who makes those decisions when we cannot make them. This includes decisions about where you live, what activities you participate in and what medical treatment you receive, to name a few.

1 We are using the term agent as general term for the persons being appointed. Terminology varies among provinces.

2 In Quebec, the mandate in case of incapacity.

You can name a person within a deed² to lawfully make personal care decisions for you. In addition, you can give that person direction in the deed on how to make those decisions for you. You may even state when you want to have medical care ended or withheld.

Choosing a personal care agent

Your personal care agent may be the same person as your financial agent. Many of the good qualities your financial agent has are helpful in this role as well. However, another aspect to consider is if the person has views on personal care issues that fit with your own views. For instance, if you think that some medical procedures are too invasive and not wanted in your life, it is good to have an agent who has the same view. You may attempt to set out your views in the deed appointing your agent. However, it is difficult to cover all medical procedures in the deed. Knowing that your agent has an understanding of your view and will act accordingly is a reassuring back up to the instructions in your deed.

Lastly, the person you choose as a personal care agent needs to have good resolve. They will need to make decisions in very stressful situations. Often, other individuals, including friends and family, will try to persuade them to make decisions that they are not comfortable with. However, your agent should make decisions as you would want them made. Many agents, in these circumstances, have found it much more difficult to make personal care decisions than financial decisions.

Your spouse or another family member is often a good choice for a personal care agent. Or, you may choose a trusted friend to act for you if family members are unsuitable or unavailable. Having more than one person act as your agent is also possible. In this situation, you should provide a way for your agents to avoid becoming deadlocked over a decision. Lastly, choose an alternate person to act as your agent, just in case your first choice is not able to act.

Unlike a financial agent, your personal care agent is not entitled to charge a fee.

Powers of a personal care agent

The law in most provinces gives you the ability to confer almost total decision-making power to your agent regarding your personal care. Accordingly, you should carefully consider giving your agent some guidance in the deed. This is especially true for circumstances where the giving

or withholding of medical treatment will impact your quality of life. You may want to discuss your options with a medical professional. Such a professional can help you understand the powers you are giving to your agent and help you word your guidance appropriately.

Your spouse or another family member is often a good choice for a personal care agent

Working Together

The law treats your two types of agents quite distinctly from each other. However, you can well imagine that their work is highly dependent on each other. For example, in considering personal care for you, your personal care agent will have many choices. An important factor in making such decisions is the cost of that care. Your financial agent will need to work and be in agreement with your personal care agent. Your agents will need to work together in making many decisions on your behalf. Where your agents are separate persons, you may want to consider how well they can work together.

Deeds for Appointing Agents

The law of agents varies from province to province. As a consequence, the names given to deeds that name and give powers to agents also vary. Below is a table that helps you ascertain the applicable deed in your province or territory.

Province / territory	Financial Agent	Personal Care Agent
Alberta	Enduring power of attorney	Personal directive
British Columbia	Enduring power of attorney / representation agreement	Representation agreement
Manitoba	Power of attorney for property	Health care directive
New Brunswick	Power of attorney	Power of attorney for personal care
Newfoundland	Enduring power of attorney	Advance health care directive

Northwest Territories	Enduring power of attorney	Personal directive
Nova Scotia	Continuing power of attorney for property	Personal directive
Nunavut	Springing or enduring power of attorney	(No legislation)
Ontario	Continuing power of attorney for property	Power of attorney for personal care
Prince Edward Island	Power of attorney	Health care directive
Quebec	Mandate given in anticipation of incapacity	Mandate given in anticipation of incapacity
Saskatchewan	Power of attorney	Health care directive
Yukon	Representation agreement / enduring power of attorney	Representation agreement / advance directive

Tax & Estate Planning

As an individual investor or a business owner, you have unique objectives and priorities that need to be considered. At Richardson Wealth, your Investment Advisor collaborates with our in-house Tax & Estate Planning professionals to deliver customized wealth management solutions designed to address tax, estate, insurance, philanthropic and succession needs.

Our approach. Our expertise. Our experience.
Our difference.

This article has given you a broad overview of planning for your incapacity. As with other planning, you should consult appropriate professionals to help you complete your incapacity planning.

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