Bulletproof your power of attorney

Minimize the risks when you delegate authority over your financial affairs | *by Linda Silver Dranoff*

Financial abuse of seniors is a growing problem, often arising from misuse of powers of attorney and joint accounts. The standard power of attorney document gives the power to do everything you yourself could do with your assets and income, except make a will. It's an important delegation of power and one that is open to abuse. If fraud does occur, you or your estate will have to call the police, sue in civil court or choose to ignore it to avoid family squabbles. These are traumatic and expensive options. Prevention is preferable.

Delegate power over your financial affairs only to those who have financial expertise and whose integrity you trust. The person should not be in debt, have a history of high-risk investments or poor money management. The ideal person is a professional fiduciary, such as a lawyer or accountant, whose professional organization oversees their work.

Most people hand over control of their finances out of concern that they may become incapable of managing their own affairs. Keep in mind only six to eight per cent of adults over age 65 lack decision-making capacity, the risk increases mostly with advancing age. The test of capacity is generally defined as knowledge of the nature and extent of your property, your obligations to any dependents and what the attorney is empowered to do. If you are aware that you are losing your mental capacity, make your decisions and sign the documents while you can still prove you are capable.

If you want the power of attorney to be effective only if and when you become incapable, then the document should say so. You can achieve a similar result if you sign a power of attorney, but specify that the document must be kept in safekeeping until your attorney is justified in using it. For example, you could leave the actual document with your lawyer with specific written instructions on when to release the document.

You can limit the power of attorney to be used only for restricted purposes, such as power over one or more bank accounts, a particular piece of real estate or real property generally or specific brokerage accounts. You can limit the time period when the power of attorney is valid, for example, a period of time when you are out of the country and incommunicado, or make it a power that is valid only for a year and replace it annually.

If you are going to hospital for a specific period of time, there are other solutions that can help in the management of your financial affairs. You can establish one bank account to receive income and pay bills and have an attorney only for that account.

You can name two or more attorneys as a fail-safe mechanism and require unanimity among the named attorneys to exercise the power of attorney. Be specific as to whether your attorney is to be compensated for his efforts and if so, according to what scale, whether it be a tariff or an hourly rate.

A power of attorney can be revoked but, you should retrieve the original document to ensure it is not used because it will appear to be valid.

A joint account does not carry with it the opportunity to limit its use as a power of attorney does. A bank account held in joint tenancy with right of survivorship can be accessed by either joint tenant without restriction unless you register a requirement that both owners must sign any cheques or withdrawals. Jointly owned real property cannot be sold or mortgaged without the consent of both owners unless a court orders it.

Jointly owned assets pass to the survivor. Many people try to avoid the costs to probate a will by transferring assets to joint ownership so the surviving tenant will become owner on the other's death. If there are competing beneficiaries, this may backfire. In a recent Supreme Court of Canada case, an aging father gratuitously placed the bulk of his assets in joint accounts with his daughter. On the father's death, she got everything. The beneficiaries of the will claimed that the funds should be part of the father's estate. The majority of the court agreed, ruling there was no presumption of gift when the surviving joint tenant was an independent adult and could not prove a gift was intended and the parent had provided all the funds for the account.

If you need advice, see a lawyer or consult the Advocacy Centre for the Elderly. Go to **www.advocacycentreelderly.org**

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Linda Silver Dranoff, LSM, BA, LLB, practises family law, wills and estates and is the author of Every Canadian's Guide to the Law *(HarperCollins).*