



FRANKLIN
TEMPLETON

STEPPING IN: YOUR ROLE AS ATTORNEY

We always stress the importance of creating a power of attorney—the formal document¹ where you, the “donor,” appoint someone to make financial decisions on your behalf if you’re no longer able.² However, let’s turn the situation around. What if you’re the person or trust company that’s the appointee, otherwise known as the “attorney?”³ What are your responsibilities when the donor no longer has the capacity to make financial decisions? How should you fulfil those responsibilities? They’re vital questions and we’re here to highlight what happens next when it’s time for you to step in.

Consider the hypothetical case of John Doe, the named attorney for his widowed aunt, Sally Roe. She asked John because her two children live far away and don’t get along. Sally has early stage dementia and she’s asked John to begin acting as her attorney.

As an attorney, John has a fiduciary role, which carries legal responsibilities such as being trustworthy, honest and acting in good faith. He must manage Sally’s money for her benefit, not his. It doesn’t matter if Sally has a lot of money or whether John is a family member. If John fails to meet these standards, he can be removed as attorney, and if he commits serious mistakes he can be sued.

You can get a clearer picture of John’s responsibilities by reviewing the five basic duties of loyalty, diligence, prudence, independence and accountability.

1. Loyalty:

John must only do what Sally’s power of attorney says he can do and what provincial law allows him to do.

As much as possible, John should involve Sally in decision making. If she can communicate, John should always ask her what she wants. Her capacity to make decisions may change from time to time, but John should be governed by what he truly believes Sally would say in any situation.

John should read Sally’s will, if it’s available, and be extremely careful not to do anything that changes the way she wants property distributed after her death. For example, he shouldn’t sell property that’s bequeathed to someone in Sally’s will.⁴

2. Diligence:

John must be proactive. If he accepted the appointment in good faith while Sally was competent and has reason to believe she’s having difficulty making decisions, he has a duty to begin assuming responsibility for Sally’s finances, as a way of protecting her.

He must diligently investigate Sally’s financial situation and take steps to inform her children, and anyone else with whom she interacts on financial matters, that he now has legal authority over her finances. Some organizations may resist accepting John’s authority; he needs to persevere and overcome this resistance.

Once John starts managing Sally’s finances, he can’t simply quit if he finds the job too difficult. He can’t leave Sally without an attorney and must take necessary legal steps to ensure he’s replaced.

3. Prudence:

John must manage Sally’s money carefully, more carefully than he might manage his own. John should:

- Make a detailed list of Sally’s money, real property, tangible personal property and debts.
- Protect Sally’s property by putting valuable items in safety deposit boxes, changing locks on doors and making sure there’s sufficient insurance to protect Sally from loss or liability.
- Review Sally’s investments, determine an appropriate investment policy for her circumstances and invest her money very carefully.

1. This topic can be quite complicated, especially as terminology and rules governing a power of attorney vary among provinces. For instance, the document can also be called enduring power of attorney, continuing power of attorney for property, representation agreement, etc.

2. Diane Tom, “An All Together Powerful Option,” *Perspective*, Trust & Estate Services, April 2015, Fiduciary Trust Canada, <https://www.fiduciarytrust.ca/en-ca-ftci/insights>.

3. In this context, an attorney does not mean a lawyer.

4. In very rare cases, helping Sally do some pre-mortem estate planning might be in Sally’s best interest, but this is a risky area and John will need to seek expert legal advice before doing anything that affects her estate.

While Sally might have been a risk taker, John can't accept the same level of risk. For example, if Sally's portfolio is heavily weighted in a single stock, John might have a duty to reduce that risk by diversifying her portfolio. When investing, John will be held to the prudent investor standard—doing what a prudent person with sound investment knowledge would do in a similar situation.

- Pay bills and taxes on time, including filing any delinquent tax returns.
- Collect all money owing to Sally on time and, if necessary, through collection procedures.
- Research whether Sally is eligible for any government benefits, such as employee benefits, Canada Pension Plan, disability tax credits or support programs, etc., and apply for benefits on Sally's behalf.
- Seek advice from professionals if he's uncertain about Sally's or his legal rights and responsibilities.

4. Independence:

John should avoid even the slightest appearance of having a conflict with Sally's interests. For example, John shouldn't purchase any of Sally's property for his use, shouldn't borrow from Sally, or lend or give any of Sally's money to anyone else.⁵ He shouldn't live rent-free in Sally's house, take vacations at her cottage or drive Sally's car for his purposes. John shouldn't pay himself a fee for acting as Sally's attorney, unless he's clearly authorized to do so under provincial law, and by the terms of the power of attorney.

5. Accountability:

John must keep good records and be ready to explain any decisions he makes on Sally's behalf.

John should keep Sally's money separate from his money. He shouldn't deposit any of Sally's money into his account, nor should he pay any of her bills from his bank account. He should avoid using cash to pay Sally's expenses. Account registrations and the title to real property should bear Sally's name, making it clear to everyone who owns the property.

John should keep careful accounting records; starting with a list of all Sally's property as of the date he assumed responsibility for her assets. He should also keep all receipts and disbursements made on Sally's behalf, and the current balance of her accounts.

He might hire a bookkeeper or accountant or use accounting software. Another option might be to hire a trust company as his agent and outsource his accounting duties to the trust company, which will have experience in this area.

He should set up a filing system dedicated to Sally's records. One system, known as "PFILE," involves using an accordion file with sections for Personal, Financial, Insurance, Legal and Estate Planning.⁶

John should keep receipts for any of Sally's expenses he pays out of his pocket. Depending on how much work he's doing on Sally's behalf and how much time it's consuming, he should consider keeping a time log so he can prove how much time he's dedicated to his attorney role.

Sally's power of attorney may direct John to provide regular accounting statements to someone independent from John, perhaps her two adult children. If the power of attorney is silent on this question, depending on circumstances, John might seek out someone to independently monitor his actions. In any case, upon Sally's eventual death, John should be prepared to provide an accounting to Sally's executor, if requested to do so.

Unfortunately, in today's world, John needs to protect Sally from some additional risks. Firstly, Sally might be vulnerable to financial exploitation by her family, friends, neighbours or strangers. John should carefully monitor Sally's bank and investment accounts for signs of any unusual activity that might indicate someone is taking advantage of her. Secondly, he must check with Sally regularly to ensure she hasn't been exploited by any of the consumer scams, such as email exploits or abusive selling practices by unethical businesses.

An Important Role

Acting as attorney for a vulnerable person might be one of the most difficult jobs you'll have in your lifetime. It can also be one of the most rewarding, if done with love, tact and full knowledge of your duties.



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5. Sally's power of attorney might direct John to continue giving gifts to her children, or to make charitable donations in the same way she did. If so, John should obey the power of attorney. But, he can't use Sally's money for anyone but Sally, unless he's expressly authorized to do so.
6. Seniors First BC publishes an excellent Attorney Toolkit containing checklists and recommendations like the PFILE System at <http://seniorsfirstbc.ca/resources/attorney-toolkit>. Be aware, there may be provincial differences.

