

POWERS OF ATTORNEY

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I. INTRODUCTION

The purpose of this paper is specifically about a Power of Attorney granted with respect to the Attorney's management of a Grantor's property or financial affairs and/or personal affairs. In this regard the Province of Saskatchewan passed a new statute called *The Powers of Attorney Act, 2002* which I will refer to from time to time as "the Act". This new Act sets out the requirements of Powers of Attorney granted for this purpose.

A Power of Attorney can be granted for many reasons. An example is a Power of Attorney granted by a corporation where an Attorney is appointed to receive documents in the Province of Saskatchewan. Another example is where the person entitled to apply for a grant of administration appoints another person Power of Attorney to obtain the grant. Each Power of Attorney is given for a specific purpose.

It is not my intent to discuss Powers of Attorney generally. My intent is to discuss Powers of Attorney dealing with the management of another's property, financial affairs and personal affairs. Usually the Power of Attorney is an estate-planning document a lawyer prepares for an older person along with the will and health care directive.

II. DEFINITION

A Power of Attorney is a document given by one person (the "Grantor"), to another person (the "Attorney"), giving the "Attorney" the power to act on the "Grantor's" behalf for either a general purpose or a specific purpose.

In this paper I will refer to the maker of the Power of Attorney as the "Grantor" and the person appointed to act as the "Attorney".

The Power of Attorney sets out specifically what powers are given to the Attorney. No longer is it necessary to list comprehensively all of the powers that the Attorney has. If the intent is to grant a general Power of Attorney for all financial matters it is sufficient to state, “the Attorney has general authority in all my property and financial affairs”. This statement gives an all encompassing power to the Attorney to handle all property and financial affairs.

The use of this one line phrase “all property and financial affairs” helps put in plain language the Power of Attorney document that lawyers prepare. Lawyers no longer need to prepare the long Power of Attorney documents that were done in the past.

Section 15(3) of *The Land Titles Regulations, 2001* requires the Power of Attorney to contain a statement as to the power of the Attorney:

- (a) to deal with real property,
- (b) to deal with any title or interest held, and
- (c) to perform any dealings of the Grantor pursuant to the *Act*.

Because of Section 15(3) I have added the following to my standard Power of Attorney:

I give my Property Attorney power to perform any dealings on my behalf relating to my real property or titles or interests in real property as required by *The Land Titles Act, 2000* and any amended *Land Titles Act* of Saskatchewan and any other land titles jurisdiction.

The Registrar of Titles has confirmed that adding this paragraph is not necessary. “Property” is defined in *The Land Titles Act, 2000* to mean real and personal property so the forms under the *Act* are acceptable to Information Services Corporation.

III. TYPES OF POWERS OF ATTORNEY

The general Power of Attorney is the most common form of Power of Attorney. In the document the Grantor gives wide sweeping powers to the Attorney. The general Power of Attorney encompasses all powers which an Attorney may need to manage the Grantor's property and financial affairs.

A specific Power of Attorney is given, for example, to deal with specific land or banking at an individual bank. A specific Power of Attorney is given for one specific concern the Grantor has. Often the specific Power of Attorney required is provided by the institution involved (for example, a bank may have a Power of Attorney form to provide for the banking requirements for that particular bank).

IV. PROPERTY ATTORNEY

The Property Attorney is the person appointed to act for the Grantor in a Power of Attorney with respect to the Grantor's property and financial affairs.

Until 2004 this was the only kind of Attorney that was appointed by a Power of Attorney.

V. PERSONAL ATTORNEY

A new amendment to *The Powers of Attorney Act, 2002* made in 2004 provides for the ability to appoint a Personal Attorney. A person can be appointed to act for the Grantor under an Enduring Power of Attorney with respect the Grantor's personal affairs. This amendment to the *Act* fills a void in the Saskatchewan legislation. A Personal Attorney will make personal decisions on behalf of the Grantor but will not make health care decisions. Health care decisions are covered under *The Health Care Directives and Substitute Health Care Decision Makers Act*.

Provisions of *The Powers of Attorney Act, 2002* apply similarly to the Personal Attorney as they do to the Property Attorney. As a Personal Attorney will not be managing the Grantor's finances it does not matter whether the Attorney is an undischarged bankrupt.

For an Enduring Power of Attorney made after the amendment in 2004, after Personal Attorneys became appointable the Attorney is both the Property Attorney and the Personal Attorney of the Grantor, unless the Power of Attorney states otherwise. For an Enduring Power of Attorney made prior to the amendment in 2004 the Attorney is just the Property Attorney and not a Personal Attorney.

In the event that a Grantor appoints one person as Property Attorney and another person as Personal Attorney the Property Attorney's decision is preferred over the Personal Attorney's. If it is unclear whether the decision is a property or personal decision, an application can be made to the court for direction. Where possible it is recommended that the Property Attorney be one in the same person as the Personal Attorney. Conflict can result if a different person is appointed for property decisions than for personal decisions.

VI. FORMALITY

If the Power of Attorney complies with *The Powers of Attorney Act, 2002* no separate Affidavit of Execution of Witness is referred to be filed. The Saskatchewan Land Registry has confirmed in writing that the Legal Advice and Witness Certificate of a lawyer is sufficient.

Presently a Power of Attorney prepared prior to *The Powers of Attorney Act, 2002* needs an Affidavit of Execution to accompany it. (See section 15.1 of *The Land Titles Regulations, 2001*.)

If the Power of Attorney is to be used outside the Province of Saskatchewan consideration should be given to completing the Affidavit of Execution. The witness should attend before a Notary Public in and for the Province of Saskatchewan who should notarize the document and affix the Notary Public's seal.

An Enduring Power of Attorney is not valid unless it is in writing, dated and signed by the Grantor. Provision is made in the *Act* for someone to sign at the direction of the Grantor.

An Enduring Power of Attorney to be signed by the Grantor shall be signed in the presence of a capable witness who is not the Attorney or a family member of the Grantor or Attorney. The witness must sign in the presence of the Grantor.

An Enduring Power of Attorney is not valid unless it meets one of two requirements:

- (a) it must be witnessed by a lawyer and be accompanied by a Legal Advice and Witness Certificate in the prescribed form; or
- (b) because Saskatchewan is sparsely populated, and not everyone has access to a lawyer provision is made for an alternative. Two adult capable witnesses who are not the Attorney or family members of the Grantor or Attorney can be the witnesses and complete the Witness Certificates in the prescribed form.

VII. CAPACITY

For the Grantor to grant a Power of Attorney the Grantor must have capacity to enter into the Power of Attorney. The Grantor must, with the assistance of whatever explanation he is given, have the ability:

- (a) to understand information relevant to making decisions with respect to property and financial affairs or personal affairs, as the case may be; and
- (b) to appreciate the reasonably foreseeable consequences of making or not making a decision referred to in clause (a).

The granting of a Power of Attorney to the Attorney does not deprive the Grantor of the power to act. The Grantor of the Power of Attorney continues to have the capacity to execute instruments and conduct his financial affairs notwithstanding that he has granted a Power of Attorney to the Attorney.

VIII. ENDURING

Almost every Power of Attorney you will be asked to prepare for estate planning purposes will be an Enduring Power of Attorney. A Power of Attorney is enduring if the Attorney's authority under the Power of Attorney is not terminated when the Grantor becomes incapacitated after the Power of Attorney has been executed. If the Power of Attorney does not contain such a provision and the Grantor becomes mentally incapable, the Power of Attorney ceases to be an effective Power of Attorney.

IX. NUMBER

Unless the Power of Attorney states otherwise, the Grantor can give the Power of Attorney to Attorneys jointly in which case they must act together. However, if one of the joint Attorneys dies or has indicated in writing to the other Attorney(s) that he is unwilling to act or is found by the court to lack capacity, then the Power of Attorney remains effective.

Attorneys can be appointed to act severally. In such a case, either Attorney could sign for the Grantor and if one Attorney dies the other one(s) could continue using the Power of Attorney and the Power of Attorney would remain effective.

The Grantor must determine whether or not the naming of joint Attorneys is a good precaution. Because financial abuse of the elderly is quite common it is certainly worth consideration. If the Attorneys are named to act severally then one Attorney could act to the detriment of the Grantor. An Attorney could also act to the detriment of the other Attorney who may be opposed to the actions of the other Attorney.

X. CONDITIONAL POWER OF ATTORNEY

Usually the appointment of an Attorney under an Enduring Power of Attorney comes into effect on execution of the Enduring Power of Attorney and is an immediate Power of Attorney. A Power of Attorney can be made to come into effect at a specified future date or on the occurrence of a specified contingency. The contingency could be that of the lack of capacity of the Grantor. The Power of Attorney can have a springing into effect when capacity is lacking. The problem is that third parties such as the Land Registry and financial institutions must know the condition bringing the Power of Attorney into effect has been met.

This contingency to the Power of Attorney coming into effect can occur by specifying one or more persons whose written declaration would specify that the contingency is deemed to have occurred for the purposes of bringing the contingent appointment into effect. The declaration provisions are set out in the *Act*.

If the Power of Attorney has a condition for a Power of Attorney coming into effect when the Grantor lacks capacity, and no provision is made for determining if the Grantor lacks capacity, the Grantor is deemed to lack capacity if two members of the prescribed professional group declare in writing that the Grantor lacks capacity. The *Regulations* to the *Act* set out who are prescribed professionals.

Provision is made, if the specified contingency is other than lack of capacity, for a court application to declare that the specified contingency has occurred.

XI. SUBSTITUTION

An Attorney cannot appoint someone else to substitute for himself as Attorney unless the Power of Attorney document gives the Attorney the power to appoint a substitute or to delegate any of his powers to another person.

XII. DURATION

An Enduring Power of Attorney can be given for an unlimited or limited time period or for some future time period. The document itself can specify the time period for which it applies. The authority of an Attorney under an Enduring Power of Attorney will terminate if any of the following occur:

- (a) the specified time for which it was given ends;
- (b) where the applicable Property Guardian (or Personal Guardian) has been appointed pursuant to *The Adult Guardianship and Co-decision-making Act*;
- (c) by the Attorney providing a written resignation;
- (d) by the Grantor revoking the Power of Attorney while the Grantor has capacity;
- (e) the death of Grantor or Attorney;
- (f) the Attorney lacking capacity;
- (g) the Attorney becomes bankrupt or provides personal care or health care services to the Grantor for remuneration;
- (h) if the Grantor and Attorney are spouses who cease to cohabit as spouses; and
- (i) the Attorney is convicted of a specified criminal offence except as set out in Section 6(2) of *The Powers of Attorney Act, 2002*.

XIII. REVOCATION

Most Powers of Attorney can be revoked by the Grantor and the Grantor does not need the Attorney's consent.

A Power of Attorney can be irrevocable if it is given to a party as part of a business transaction but this is an exception. If the Power of Attorney is revoked and the Grantor has land the revocation of the Power of Attorney should be filed at the Land Registry. The forms prescribed by *The Land Titles Act, 2000* should be used.

The problem with revoking a Power of Attorney is bringing it to the attention of other parties who may be given the Power of Attorney. If, in fact, the Grantor feels the Attorney may use it against his wishes the Grantor should make a concerted effort to notify those persons as quickly as possible to prevent the misuse of the Power of Attorney.

If the Grantor revokes the Power of Attorney the first person he should notify is the Attorney.

If the intent is to revoke all previous Powers of Attorney consideration should be given to putting a revocation clause in the new Power of Attorney. This revocation provision would resolve which Power of Attorney is to apply.

XIV. ATTORNEYS ACTING

The *Act* has some limitations on an Attorney being able to act. An Attorney must be 18 years of age and have capacity. The Attorney cannot be an undischarged bankrupt. An Attorney who has been convicted in the last ten years of a criminal offence relating to assault, sexual assault, acts of violence, intimidation, criminal harassment, uttering threats, theft, fraud or breach of trust may not act unless the Attorney has been pardoned. Also the Attorney can act if the Grantor acknowledges the conviction in writing and consents in writing to the Attorney acting.

The *Act* builds in safeguards to protect the Grantor from an Attorney who can be intimidating, in financial trouble or untrustworthy.

An Attorney cannot act if the Attorney's occupation or business involves providing personal care or health care services to the Grantor for remuneration.

A Grantor may be a Corporate Attorney if the Corporate Attorney discloses in writing the fees to be charged prior to the Enduring Power of Attorney being executed.

XV. DUTY TO EXERCISE

An Attorney who receives the Power of Attorney does not need to sign the Power of Attorney. An unpaid Attorney, that is a gratuitous Attorney, is under no obligation to act notwithstanding that the Attorney has been given the power to act. An acting Attorney must exercise his authority honestly, in good faith and in the best interest of the Grantor. The Attorney should use the care that could be reasonable expected of a person of the Attorney's experience and expertise. The Attorney should take into consideration the wishes of the Grantor.

Unless the Enduring Power of Attorney states otherwise, the Property Attorney may provide for the maintenance, education and benefit of the Grantor's spouse and dependent children even if the Property Attorney is the Grantor's spouse. The Attorney may not change the Grantor's will.

If the Attorney does decide to exercise the powers granted to him the normal form of execution of the Power of Attorney is as follows:

D.D. (Grantor's Name)
by his Attorney A.A. (Attorney's name)

If there are joint Attorneys they should sign the plural "as Attorneys". If the Attorneys are appointed to act severally or either one of them, then only one Attorney needs to sign although if they are both present it would be advisable for both to sign.

XVI. AUTHORITY OF ATTORNEY

An Attorney has authority respecting the property and financial affairs or personal affairs of the Grantor pursuant to the terms of the Enduring Power of Attorney.

The Grantor may give the Attorney specific or general authority respecting property and financial affairs where the Attorney is the Property Attorney. The Grantor may give the Personal Attorney specific or general authority respecting personal matters.

If the Attorney wishes to use the power then the party that the Attorney is dealing with will want to see the Power of Attorney. The Attorney should have enough signed copies of the Power of Attorney to establish his authority by producing the original Power of Attorney. The party with whom he is dealing must be satisfied that the Attorney still has the appropriate authority.

The party dealing with the Attorney will require an original copy of the Power of Attorney or a certified copy of such Power of Attorney.

The Power of Attorney should remain with the Attorney and not the Grantor because it is the Attorney who requires the document in order to act from time to time.

Recently I have seen mortgages being signed by Power of Attorney. Powers of Attorney are usually given to manage a grantor's property in the event of incapacity. I have serious concerns about an Attorney incurring new debt such as mortgages with a Power of Attorney. Consideration needs to be given to restricting an Attorney from incurring new indebtedness such as mortgages. You should consider adding a limitation to the authority such as "except my Attorney is prohibited from incurring any new debt or new mortgage on my behalf".

XVII. ACCOUNTING

Because the Attorney is dealing with another person's assets, the Attorney must account for all the Grantor's assets which the Attorney deals with. The Attorney has a duty to keep records and to keep the Grantor's property separate and apart from the Attorney's own property. The Attorney shall also produce an accounting to the Grantor upon request.

The Attorney should consider the Grantor's affairs confidential. The Attorney should not transfer properties of the Grantor to himself. An Attorney can be guilty of theft under the provisions of the *Criminal Code* for misuse of a Power of Attorney.

If the Grantor lacks capacity an accounting may be requested of the Attorney by:

- (a) a person named by the Grantor in the Enduring Power of Attorney;
- (b) if no person is named by an adult family member of the Grantor; or
- (c) a Personal Attorney or Property Attorney, if any.

If an accounting is not obtained any interested person may request the Public Guardian and Trustee of Saskatchewan to direct the Attorney to provide an accounting. The Public Guardian and Trustee can direct an accounting if he considers it necessary and in the public interest to do so. Alternatively provision is made in the *Act* for an application to the court to direct an Attorney to provide an accounting.

An Attorney may charge a reasonable fee for services rendered by the Attorney out of the Grantor's assets. If the Attorney charges a fee the Attorney must provide an annual accounting in the manner specified in the *Act*. The Power of Attorney could specify what the Attorney could charge.

XVIII. LIABILITY OF ATTORNEY

An action taken by the Attorney under the Power of Attorney is valid and binding in favour of a third party if that third party does not know of the existence of circumstances that would make the Power of Attorney not valid and binding.

An Attorney is not liable to the Grantor or the Grantor's estate for any action taken under the Power of Attorney if the Attorney did not know the Power of Attorney was not valid and binding. The Attorney must not know of any circumstances that would make the Power of Attorney invalid and the Attorney must exercise reasonable care.

XIX. PROPERTY GUARDIAN

If a Grantor becomes mentally incapacitated an Enduring Power of Attorney can avoid a court application for Property Guardianship.

If someone chooses to obtain an order of Property Guardianship under *The Adult Guardianship and Co-decision-making Act*, then the Power of Attorney will cease. *The Adult Guardianship and Co-decision-making Act* provides for specific steps and procedures to be followed for a Property Guardian to be appointed.

The advantage of a Property Guardian being appointed is a Property Guardian would be required to meet strictly set out procedures and requirements for accounting and security. The Property Guardian would also be required to act whereas an Attorney is under no duty to act if the Attorney was appointed gratuitously.

The disadvantage of a Property Guardianship is the court and legal costs of the application. It often can be more adversarial because it involves court. If, in fact, the Attorney has an Enduring Power of Attorney, after a mental infirmity, the need for the court expense can be avoided.

Another advantage of a court appointed guardian is that the Grantor ceases to have legal capacity. Often the Grantor will be victimized by others and it may be necessary to obtain a court order to stop the Grantor from mismanagement of his or her financial affairs.

XX. EXTRA-PROVINCIAL POWERS OF ATTORNEY

A Power of Attorney made out of province is an Enduring Power of Attorney if it is valid according to the law of the place where it is executed and if it provides that it is not terminated by the lack of capacity of the Grantor. A contingent extra-provincial Power of Attorney is also valid if it is made according to the law of the place where it is executed and provides that it comes into effect on a specified future date or contingency.

XXI. POWERS OF ATTORNEY AND TAXATION

When preparing a Power of Attorney for a client one must be mindful of the tax implications. The *Income Tax Act (Canada)* allows for small business deductions up to \$300,000. If the Grantor has a small corporate business and the Attorney appointed has a small corporate business the Grantor could associate the two companies for income tax purposes. The Power of Attorney can have the effect of associating two small business corporations and thus the two corporations have to share one small business deduction. This association could have dire tax consequences to the Grantor and the Attorney. As a result the choice of Attorney can have harmful tax consequences.

XXII. HOMESTEAD

When doing a Power of Attorney you should consider the provision of *The Homesteads Act, 1989*. Usually spouses will own their homestead in joint names. If one spouse becomes incapacitated the other spouse often will want to sell their home. If the home is in joint names the Power of Attorney can be used by the Attorney to execute the transfer of the home to the purchaser on behalf of the incapable owner. If the incapable spouse is the non-owning spouse of the homestead the Power of Attorney cannot be used by the Attorney to sign the consent of the non-owning spouse. I refer you to section 6 of *The Homesteads Act, 1989*.

XXIII. FORMS

The *Act* provides for forms. These forms are in *The Powers of Attorney Regulations*. The forms, most of which are not all mandatory, are the following:

- (a) Form A - an Enduring Power of Attorney appointing a Personal Attorney;
- (b) Form B - an Enduring Power of Attorney appointing a Property Attorney;
- (c) Form C - an Enduring Power of Attorney appointing both a Personal and Property Attorney;
- (d) Form D - the Legal Advice and Witness Certificate required of a lawyer;
- (e) Form E - the non-lawyer Witness Certificate required by the two non-lawyer witnesses;
- (f) Form F - the Acknowledgement and Consent for the Grantor to sign that he is aware the the Attorney has been convicted of a criminal offence;
- (g) Form G - a Declaration of Occurrence of Contingency;
- (h) Form H - an Accounting by a Property Attorney;
- (i) Form I - an Accounting by a Personal Attorney; and
- (j) Form J - a Revocation of an Enduring Power of Attorney.

XXIV. CONCLUSION

My experience is that almost all older people are quite prepared to execute an Enduring Power of Attorney as part of their estate plan. They believe that either their spouse, child or children are trustworthy and it is desirable they have a Power of Attorney to manage their financial affairs if mental incapacity should occur. The elderly person does not believe it is necessary for a guardian to be appointed by the court if he or she should become incompetent.

The Power of Attorney will continue to be an effective planning document for all older people. The elderly person should be sure the Attorney is trusted by the other family members and by the elderly person.

PRECEDENTS

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INTRODUCTORY COMMENTS

Although there are different forms provided by *The Powers of Attorney Act, 2002* I find that I'm using the same precedent frequently. Add-ons can be made to the Power of Attorney that you prepare with this precedent. You should consider putting in the Power of Attorney what the Attorney is to receive in terms of compensation. A compensation clause could alleviate disputes between the Attorney and others as to the fees charged by the Attorney for his services.

I have attached a precedent Power of Attorney which should be of assistance to you. This precedent does not include the Witness Certificate.

(This page has been intentionally left blank.)

**Enduring Power of Attorney
Appointing a Personal and Property Attorney**

This Enduring Power of Attorney is given

by _____
(Name of Grantor)

of _____
(Street Address) (City) (Province) (Postal Code)

1. Appointment

I appoint my spouse, _____,
(Name of Personal and Property Attorney)

of _____
(Street Address) (City) (Province) (Postal Code)

to act as my Attorney in accordance with *The Powers of Attorney Act, 2002*.

In the event my spouse dies, indicates to _____ and
(Name Alternate of Personal and Property Attorney)

_____ that he is unwilling or unable to act, or
(Name Alternate of Personal and Property Attorney)

a court finds that he lacks capacity, then I APPOINT

_____ of _____ SK
(Name of Alternate Personal and Property Attorney) (City) (Province)

and _____ of _____ SK
(Name of Alternate Personal and Property Attorney) (City) (Province)

to act as my Personal and Property Attorneys in accordance with *The Powers of Attorney Act, 2002*;

Successively (your Attorneys will act in order of appointment) with
_____ acting first; and

Jointly (your Attorneys will act together) as to _____
and _____.

2. Authority

I give my Personal and Property Attorney(s) general authority respecting all of my personal affairs and all of my property and financial affairs.

3. Land Registry

I give my Property Attorney power to perform any dealings on my behalf relating to my real property or titles or interests in real property as required by *The Land Titles Act, 2000* and any amended *Land Titles Act* of Saskatchewan and any other land titles jurisdiction.

4. Decision-making

If my Personal and Property Attorneys are appointed to act jointly or successively and if one of my Attorneys dies, is unwilling or unavailable to act or is found by a court to lack capacity, the other may act.

5. Enduring Power of Attorney

My Personal and Property Attorney's authority under this Enduring Power of Attorney shall not be terminated by my lack of capacity that occurs after my Enduring Power of Attorney has been executed.

6. Compensation (*optional*)

My Personal and Property Attorney is to be compensated if my Attorney acts on my behalf due to my lack of capacity. Each Attorney shall be compensated annually the sum of \$_____ for the Attorney's fees and disbursements. If my Attorney finds that this compensation is inadequate, the Attorney shall be at liberty to apply to the court for such further compensation as a court may award.

Precedent - Enduring Power of Attorney Appointing a Personal and Property Attorney

7. Accounting (optional)

If I lack capacity, an accounting of my Personal and Property Attorney's (Attorneys') management of my personal affairs and my property and financial affairs may be requested

by _____
(Name of Person)

of _____.
(Street Address) (City) (Province) (Postal Code)

8. Signatures of Grantor and Witnesses

DATED at the City of Saskatoon in the Province of Saskatchewan this _____ day of _____, 2005.

SIGNED, SEALED AND DELIVERED)
in the Presence of:)
)
)
_____)

a Barrister and Solicitor in and for the
Province of Saskatchewan whose address
is _____