

ENDURING POWER OF ATTORNEY

FREQUENCY ASKED QUESTIONS

- **Key Terms**

- “**Attorney**” means the person(s) appointed in the Power of Attorney to make financial decisions for the Donor
- “**Donor**” means the person who is the creator and subject matter of the document
- “**Property**” means all real (land and buildings) and personal (everything else, including vehicles, investments, bank accounts, household belongings, etc.) property, including liabilities

- **Who needs a Power of Attorney?**

- All Adults, regardless of age or marital status, who are over the age of eighteen (18) years and understand the nature and effect of signing a Power of Attorney
- A Represented Adult who is subject to a Trusteeship Order is prohibited from making a Power of Attorney

- **What does a Power of Attorney do?**

- Authorizes the Attorney, who is a third party (i.e. spouse, child, parent, trusted friend, etc.) to deal with management of property (real and personal) on behalf of the Donor

- **Why do I need a Power of Attorney?**

- There is no default in the legislation that automatically allows a spouse / partner / children / parents / etc. to make financial decisions for you in the event of incapacity or a serious infirmity
- Having joint assets with your spouse is insufficient:
 - Land Titles requires all parties on title to sign documents capable of registration (to buy / sell / transfer / mortgage / refinance land)
 - Some investments, such as RRSPs, RIFs, TFSAs, etc. can only be owned in one person’s name for tax purposes, and accordingly, no one else has access to or can give instructions to an advisor for those assets

- Income taxes must be filed for each individual and only an authorized person can sign to remit a return to CRA
 - You control who you trust to make financial decisions on your behalf if you are unable to do so for yourself
 - The alternative is that someone (presumably a family member) will have to apply to the Court to be appointed as your Trustee in order to make financial decisions without a Power of Attorney
 - This process can be lengthy (unless you can establish urgent circumstances, it is a min. 1 month notice period if they proceed by hearing; much longer delays if they proceed by desk application)
 - The Court is generally more restrictive in the powers granted to a Trustee than the powers that an Attorney has under the Power of Attorney
 - Court now has oversight over the Trustee's decisions and actions while the Order is in effect, and your financial situation becomes part of a public record
- **What is an “Enduring” Power of Attorney?**
 - An “Enduring” Power of Attorney means that the authority granted to the Attorney continues notwithstanding a mental incapacity of the Donor that occurs after the document has been executed
- **What are the different types of Powers of Attorney?**
 - Specific
 - Typically used for a specific purpose or for a discrete event (such as the sale of land)
 - Enduring
 - Immediate
 - comes into effect immediately upon execution
 - requires the Donor to have capacity at the time of execution
 - can be revoked at any time, so long as the Donor has capacity
 - does not restrict the Donor from continuing to deal with their own property (all assets, including but not limited to land and buildings, investments, bank accounts, vehicles and other personal property, and all debts)
 - usually requires the Attorney to continue to consult with and take instructions from the Donor for so long as the Donor has capacity
 - Springing
 - ‘springs’ into effect at a later time, when a stipulated contingency or event occurs – usually the mental incapacity, or physical infirmity of the Donor that prevents them from making reasonable decisions about the management of their property, or to communicate those decisions

- until such time as the document is activated, it has no force and effect
 - can be revised or revoked at any time while the Donor has capacity
 - must state who makes decision about the contingency occurring (default in legislation is 2 medical doctors, but can vary that in document)
- **What are the responsibilities of an Attorney appointed in a Power of Attorney?**
 - At all times, the Attorney must act in the Donor's best interests
 - Make all financial decisions and manage all property on behalf of Donor
 - Manage the Donor's property with the same care, skill and diligence that a reasonable person would use to manage their own resources, including:
 - Manage real property, including buying, selling, transferring, leasing or financing
 - Manage investments and pay bills
 - Safeguard the Donor's Will
 - Must act in a manner consistent with any gifts left in the Will when managing the Donor's property
 - File income tax returns for the Donor
 - Pay expenses reasonably required for the Donor's ongoing maintenance and benefit, which may extend to the Donor's spouse and/or dependent children
 - Keep good records of all transactions in and out of Donor's accounts (the Attorney may be required to provide an accounting of their actions during the period that the Power of Attorney was activated to the Donor or to an interested party on their behalf)
 - **Is there anything that an Attorney cannot do?**
 - YES! An Attorney **cannot**:
 - use the Donor's property for themselves while acting in this role, unless the document permits it
 - transfer the Donor's property to themselves unless the document expressly permits it (even if they are already listed as an owner on the account or certificate of title)
 - alter the Donor's testamentary documents or beneficiary designations, unless consistent with previous designations (for example, if moving investments between financial institutions)
 - **What if the Donor changes their mind?**
 - A Donor can revoke or amend their Power of Attorney at any time, as long as they have capacity

- **Can anyone challenge a Power of Attorney?**
 - Yes. Any interested party, including the Donor, can require the Attorney to account for their actions while the Power of Attorney is activated. This can involve a Court review
 - Any interested party can also ask a Court to review any decision made by an Attorney, if they feel that the Attorney is in breach of their fiduciary duty to the Donor, or even have the Attorney removed

- **Is an Attorney entitled to compensation for acting in this capacity?**
 - Yes. An Attorney is classified as a “Trustee” under the *Trustee Act* of Alberta, and as such, is entitled to fair and reasonable compensation, unless the document states something to the contrary
 - The Donor can specify if, and how, the Attorney or Alternate Attorney is to be compensated
 - Generally, any such compensation is treated as a form of remuneration, or wages, and is subject to income tax

- **What happens if my Attorney does not want to, or cannot, act on my behalf any longer?**
 - An Attorney who has started to act on behalf of a Donor must be removed by a Court Order. This will involve the Attorney providing a record of all financial decisions they have made on behalf of the Donor
 - If the Attorney has lost capacity, then their Attorney or Trustee will need to provide that accounting of their actions on their behalf, so careful record keeping is essential!

- **Any special considerations if the Donor is a Trustee for a Represented Adult?**
 - Any time a Trustee is appointed, whether under a Trusteeship Order, or an informal trust like an Attorney, they have a duty to account for their actions in the management of a third party’s finances
 - This is why it is so critically important that a Trustee keep accurate and complete, up-to-date records of the decisions they have made, the income received for the Represented Adult or Donor, and the expenses they have authorized

Getting Started

Who to Choose? When getting ready to give instructions to prepare a Power of Attorney, give careful consideration to who you trust implicitly to manage your property for you in the situation when you cannot do so for yourself:

- For most married parties, the logical first choice is your spouse. Do not assume your spouse will be in a first position; you need to specify who you want. In some cases, due to age or health, you may want to appoint someone else, such as a child, instead of a spouse, or alongside a spouse.
- You can appoint more than one person to be your Attorney, or your Alternate Attorney. If more than one person is appointed, consider whether they will be required to do everything together (this is called “jointly”), or if they will both/all have access to the financial information but can make decisions independently of each other (this is called “joint and separate” or “joint and several”). There is still an obligation to confer with each other, regardless of the type of appointment, but consider their geographic location, occupation, lifestyle, and other restrictions on their time when deciding how they will be appointed.
- Always have at least one alternate appointed, just in case. This covers the situation where your primary choice loses capacity or predeceases you, or is unable to continue to act after initially being appointed. It also covers the situation where your primary Attorney is not available or willing to act, due to residency, travel, health, lifestyle restrictions, or an unwillingness, without placing yourself in a position where a Trusteeship order is necessary.
- This is not a popularity contest. You do not need to select Attorneys because you are worried about hurting their feelings. You must consider who you have in your life that has the requisite skills, financial acumen, time and ability to fulfill this role properly.
- **Rule of thumb:** *If they can't manage their own money, don't put them in charge of yours!*
- Any Attorney appointed must be a minimum of eighteen (18) years old *at the date of signing the Power of Attorney* (regardless of whether it is a springing or immediate POA)
- Also, they must be a Canadian resident for tax purposes, or you may end up with adverse tax implications. Also, they may be unable to instruct financial advisors if they are non-residents of Canada.

Specific Instructions. Consider what you have, and what will need to be managed in the event that you lose capacity.

- Do you have a business that someone will need to step in and run on your behalf? Is that person the same one who will deal with the rest of your finances, or just the business?

- Is there property that you intend for others (especially your Attorney) to receive during your lifetime, such as the succession of the family farm, a legacy property, or shares in a corporation?
- Do you want to remain living independently as long as possible, and if so, can the Attorney use your resources for this purpose (such as paying for the costs of home care or a private caregiver)?
- Do you want your Attorney to continue to make gifts to family members (birthday or Christmas gifts to spouse/children/grandchildren) or to charities after you are incapacitated?
- Do you want your Attorney compensated, and if so, what does that look like?

Special Instructions for execution. If you have a lawyer prepare your Power of Attorney, you can be confident that your documents are prepared and executed in accordance with the *Powers of Attorney Act* of Alberta. However, if you prepare your own documents, here are some things to keep in mind:

- If the Donor has mental capacity but is unable to sign the documents on their own behalf (due to a medical condition, such as a stroke, paralysis, broken bones, or arthritis), a third party can sign on the Donor's behalf if the Donor has clearly indicated they are consenting to the signing of the document (the third party CANNOT be the Attorney or spouse/partner of the Attorney)
- There are limitations as to who the witness can be for signing the Power of Attorney with the Donor. The following people cannot witness the signing of the Power of Attorney:
 - The spouse / adult interdependent (common law) partner of the Donor
 - The Attorney (or alternate Attorney)
 - The person who signed on behalf of the Donor
 - The spouse / adult interdependent (common law) partner of the person who signed on behalf of the Donor
 - The spouse / adult interdependent (common law) partner of the Attorney
 - Anyone under the age of 18 years old
 - Anyone who does not have capacity