

POWER OF ATTORNEY

March 17th, 2015

AFOA Workshop

What is POWER OF ATTORNEY

- 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.
- The powers and duties of an attorney are established by law.
- *The Powers of Attorney Act* and the Regulations under that Act set out these powers and duties.

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.

SPECIFIC Power of Attorney

- 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).

ENDURING Power of Attorney

- An enduring power of attorney (EPA) is a power of attorney that states that it is to continue in effect even if the grantor becomes incapacitated.
- There are two types of EPAs:
 - the first type takes effect immediately; and
 - the second type comes into effect on a specified future date or on the occurrence of a specified event.

ENDURING Power of Attorney

- The document can also prevent official involvement by AANDC or the Public Guardian and Trustee (as long as your attorney is acting responsibly).
- The Power of Attorney ends the moment the person who made it dies, even if there is no will.

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.

PERSONAL ATTORNEY

- 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*.

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.
- 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.

Formality Enduring POA

- Must be witnessed by a lawyer and be accompanied by a Legal Advice and Witness Certificate in the prescribed form; or
- 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.

WHO can Grant a POA

- (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).

Grantor's Continuing Ability

- 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.

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.

DURATION

- 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;

DURATION

- (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*.

REVOCACTION

- 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.

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.

Duties of Attorney

- act honestly and in good faith
- act in the best interests of the donor
- make careful and cautious decisions
- consider the donor's personal care and health care needs first, before other financial concerns
- do only what they are authorized to do

Duties of Attorney

- make only the investments permitted by the Trustee Act
- keep the donor's money or other assets separate from their own assets (except for jointly owned assets, such as a house)
- keep records and have them available for inspection
- make sure the donor has the use of their personal possessions
- not sell or give away property that is listed as a gift in the donor's will
- as much as possible, involve the donor in making the decisions that will affect them.

ACCOUNTING

- 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.

PROPERTY GUARDIAN

- 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.
- On Reserve, the INDIAN ACT gives power to AANDC to manage a person's affairs.

Resources

- Saskatchewan Ministry of Justice
- Public Legal Education Association
- <http://www.afoabc.org/downloads/incapacity.pdf>