

POWERS OF ATTORNEY

A. Introduction

A power of attorney is an inexpensive and effective estate planning tool that can save money and unnecessary inconvenience in the future.

This paper is intended to outline basic legal requirements of powers of attorney, the usefulness of an enduring clause in a power of attorney and the alternative in the absence of a power of attorney and a loss of capacity.

B. What is a Power of Attorney

A power of attorney is a legal document by which the maker (donor) grants authority to another person (attorney) to manage some or all of the donor's financial affairs. A power of attorney is only effective during the donor's life, terminating upon death. It also ends if the donor becomes mentally incompetent and incapable of managing his or her own financial affairs. It can be specific, relating to only one small aspect of the donor's financial affairs, or general governing the donor's entire estate. A power of attorney does not provide the authority for the attorney to make health care decisions for the maker. The authority to make health care decisions can be granted by a separate legal document, commonly known as a Living Will.

C. Enduring Power of Attorney

An enduring power of attorney is a type of power of attorney that allows the attorney to continue to act after the donor loses mental capacity. In the absence of an enduring clause a power of attorney terminates upon the incapacity of the donor. To be enduring the power of attorney must have a specific provision authorising the attorney to continue to act during periods of incapacity.

D. Why Have an Enduring Power of Attorney

An enduring power of attorney allows a person to plan for the day when he or she can't manage his or her financial affairs due to mental incapacity. The document allows someone to manage the donor's financial affairs when the donor is incapable of doing so.

In the absence of an enduring power of attorney the financial affairs of an incompetent person may be frozen. In such circumstances to allow for the management of the estate of the incompetent person someone would have to apply to the court to be named Committee of the estate of the incompetent person.

A Committee is a person authorised by a court order to manage the financial affairs of a person declared to be incompetent.

There are disadvantages to having to apply to become Committee:

- Someone has to apply. There is a statutorily created hierarchy which establishes priority to act as Committee, based on kinship to the incompetent person.
- The applicant must be a resident of Manitoba.
- There is a fee payable for the Court application, which is presently \$160.00.
- The Manitoba Public Trustee is required to review the application, and if there is reason to oppose the application will intervene on behalf of the incompetent person. There is a \$100.00 fee payable to the Public Trustee to review the application, whether or not it opposes the application.
- The application requires the opinion of 2 medical practitioners attesting to the person's condition and recommending the court appointment of a Committee. Doctors may charge a fee for such medical reports, the cost of which can range from \$50.00 to \$400.00 or more per report.

- A lawyer's expertise may be required to prepare the application and attend court at the hearing of the application. Legal fees of thousands of dollars may be incurred depending on the complexity of the application and whether or not the application is contested.
- Persons with an equal or prior right to that of the applicant to act as Committee must be served with the application and its supporting materials and be given an opportunity to challenge the application.
- The process to be appointed Committee may take months, during which time the assets of the incompetent person may be inaccessible.
- The applicant may be required to post a personal bond or an insurance bond and may be required to obtain sureties to guarantee the due performance of his or her duties as committee.
- After an appointment a Committee must file an inventory with the court and thereafter periodically appear before the court to have accounts approved.
- A Committee's management of the estate and entitlement to compensation are supervised by the court.

All of the disadvantages of a committeeship application can be avoided through the use of an enduring power of attorney, by which the attorney is granted the authority to administer the donor's estate during a period of incompetence.

E. Miscellaneous Considerations for a Power of Attorney

Selecting the Attorney

The choice of attorney should not be taken lightly. The person selected may be required to assume control of all of the financial affairs of the donor. Some considerations when choosing the proper person(s) to act, include:

- Select an attorney that is trustworthy and a competent financial manager;
- Although an attorney need not be resident of Manitoba or even Canada, it is convenient to name an attorney that resides in proximity to the donor;
- When selecting more than one person to act as attorney consider:
 - Convenience of both acting, since their joint presence may be required to effect some transactions;
 - A mechanism that will address a difference of opinion by joint attorneys where there are an even number acting;
 - Whether attorneys are intended to act jointly or severally;
- Attorney must be 18 years of age and cannot be a mentally incompetent person or an undischarged bankrupt;

Formal Requirements of Execution

Although no special form of document is necessary to create a power of attorney, there are formal requirements related to the execution of an enduring power of attorney, including:

- it must be in writing;
- it must include an enduring clause, one which provides that the authority to act continues during any period of incapacity of the donor;
- it must be signed by the donor in the presence of a witness, or acknowledged by the donor as his/her signature before the witness;
- it must be signed by the witness in the presence of the donor;
- it must be witnessed by a specific class of person, including a lawyer, notary public, medical practitioner, person registered or qualified to solemnise marriages, R.C.M.P. or Municipal police officer;
- neither the attorney nor his/her spouse can be a witness;
- an affidavit of execution must be completed by the witness.

Compensation

Absent a provision within the power of attorney providing for payment of compensation to the attorney, the attorney is not allowed to take compensation without court approval

F. Duties and Accountability of Attorney

Relationship

The attorney is required to represent the interests of donor and there is a duty not to conflict with that role. The assets of the donor cannot be used for the benefit of anyone other than the donor, except for purposes of maintaining dependants of the donor. The attorney cannot make gifts from the assets of the donor, even where the donor has made gifts in the past, unless the power of attorney provides for specific gifts. The attorney should not personally borrow from nor lend money to the donor's estate, unless specifically authorised to do so.

Once having acted or agreed to act, an attorney must continue to act once the attorney knows or ought reasonably to have known that the donor is mentally incompetent. To be removed the attorney requires court approval. The duty to act does not exist for an attorney that was unaware of the appointment or did not agree to act.

General Duties

The general duties for an attorney include:

- maintaining money in a separate account;
- collecting and arranging for safekeeping of documents;
- ensuring safety of property;
- maintaining real property through insurance, proper repair and upkeep and payment of taxes and other associated expenses;
- applying for money the donor is entitled to receive including CPP, EI, pension benefits, etc.;
- completing tax returns and ensuring payment of taxes;
- cancelling charge accounts;
- collecting monies owing to the donor;
- paying debts of the donor; and
- investing money of the donor.

Accountability

An attorney will be accountable for his or her administration of the property of the donor. An attorney must separate the donor's assets from his/her own and maintain proper records of the management of the estate of the donor.

The donor can name someone in the Power of Attorney to whom the attorney must periodically account, failing which the attorney is required to account

annually to the donor's nearest relative, or, if there are no relatives, to the Public Trustee of Manitoba.

Although there is no specific form of accounting required, the attorney should ensure completeness of records that will allow for reconciliation of the income received and expenses paid on account of the donor

Standard of Care

An attorney is expected to meet a certain standard of care related to the management of the donor's estate, which standard varies depending on whether or not the attorney receives compensation.

If the attorney receives compensation the duty is to exercise the judgement and care that a person of prudence, discretion and intelligence in the business of managing the property of others would exercise.

If the attorney does not receive compensation the duty is to exercise the judgement and care that a person of prudence, discretion and intelligence would exercise in the conduct of his or her own affairs

A failure to meet the standard, may lead to liability for loss occasioned to the estate of the donor

G. Coming Into Force and Termination

When a power of attorney comes into effect

The power of attorney doesn't necessarily begin when it is signed. It may rest unused for many years or forever.

Unless the power of attorney is a springing power of attorney, being one that takes effect on a certain date or upon the occurrence of a specific event defined in the power of attorney, a power of attorney commences when the donor becomes incompetent or earlier with consent of the donor.

Termination

A power of attorney can be revoked by the donor at any time during competency. It may terminate by intervention of the Public trustee if a doctor attending upon a person is unaware the person has a power of attorney and declares the person incompetent, or if concerns about the attorney arise.

The Public Trustee will investigate the circumstances with a view to the best interests of the donor and his or her estate.

Termination will also occur if:

- the court appoints someone to act as Committee;
- the donor dies or becomes bankrupt;
- the attorney becomes bankrupt, incompetent or dies; or
- it is terminated by a court.

H. Homestead Consent and Release

Significantly, a person cannot sign a document on behalf of a spouse which purports to transfer or encumber the marital home, even if the property is registered in joint names. This continues to be true where one spouse loses mental capacity.

A properly drafted enduring power of attorney can authorise someone other than a spouse to act for the purpose of transferring or encumbering homestead property, provided the donor also completes a document entitled a Spouses Acknowledgement For Power of Attorney.

The acknowledgement must be executed and sworn before a proper person, and attached to or form part of the power of attorney.

I. Information in this Paper not Substitute for Legal Advice

This paper is intended as an introduction to this topic. It is not a substitute for specific legal advice tailored to a client's particular needs. Any person wishing advice on how to order their affairs, or those of a client, should contact a member of our Wealth and Succession Practice Group. This paper is also based on the laws of Manitoba, and while laws are similar from Province to Province, the content of this paper may not be accurate in other provinces.

J. Conclusion

Planning for the financial management of one's estate during a future period of incompetence can avoid the costly time consuming alternative. This can be achieved through the use of an enduring power of attorney. It is equally significant to married persons that own all assets jointly, where there is a marital home. A power of attorney can be an inexpensive, convenient and simple estate planning tool and should not be overlooked in planning for the future.

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Wealth and Succession Practice Group

Inkster Christie Hughes Wealth and Succession Group assists clients in structuring and restructuring their wealth on an ongoing basis, and in passing wealth from generation to generation.

We regularly assist our clients in minimizing income taxes paid and structure special arrangements to improve the lives of the families, friends and community left behind. This involves estate freezes, corporate restructures, living trusts, tax planned wills, special trusts for disabled beneficiaries, estate administration, trust administration and pension fund administration.

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