

POWERS OF ATTORNEY

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The power of attorney is one instrument which may be used to appoint a substitute decision maker. However, unlike representation agreements, which are primarily used for matters of health care and personal care, powers of attorney are limited to non-health care related matters, such as financial, property, business, legal, and estate matters. Generally, an attorney may do anything in these fields except make a will for a person. Thus, a power of attorney can be used in conjunction with a representation agreement to provide for almost complete substitute decision making over all aspects of your life in the event of your incapacity. Also, powers of attorney can be used for a limited time periods and purposes, such as when a person is out of the country.

There are four types of powers of attorney:

1) General Power of Attorney

The first and oldest type of power of attorney is the general power of attorney. This power of attorney is created immediately upon execution of an agreement and ends automatically upon incapability of the person granting the power, called the “donor”. This can be useful when a capable adult wishes to appoint a substitute decision maker for a limited purpose or for certain types of decisions. However, this instrument does not assist persons to plan for the management of their financial affairs in the event of their incapacity.

2) Enduring Power of Attorney

The second type of power of attorney is the enduring power of attorney. This power of attorney did not exist at common law, and was created by legislation, the *Power of Attorney Act*. As the title suggests, this power of attorney survives the incapability of the donor, and thus is enduring. However, like the general power of attorney, it is effective immediately and the attorney has decision making power even when the donor is capable.

If the donor wishes the attorney to reserve his or her decision making power until the event of the donor’s incapacity, this can be accomplished in two ways. The first is by giving the document to a trusted third party to hold until the donor becomes incapable. The second way is to state in the document that it does not become effective until the donor becomes incapable of managing his or her own financial and legal affairs. This is accomplished by creating a springing power of attorney.

3) Springing Power of Attorney

A springing power of attorney 'springs' into effect upon the happening of a contingent event, which may be the donor's incapacity, or any other event, such as the donor's departure from the country. Although attractive to many people, it is important to note that springing powers of attorney are not provided for in current legislation and the mechanism for when they are to 'spring' into action is murky. However, they are currently recognized by courts and in the case of incapacity, will likely be recognized by legislation within the next year when Bill 29, the *Adult Guardianship and Planning Statutes Amendment Act, 2007* is proclaimed into force.

4) Limited Power of Attorney

The last type of power of attorney is the limited power of attorney. This power is granted for a limited time period and a limited purpose, and thus is the most restrictive of the four types. Although limited powers of attorney are useful, they are not an effective tool to plan to future incapacity.

Other issues which require consideration when contemplating whether to create a power of attorney include:

a. Donor

A power of attorney must be created by a capable adult and cannot be created once the donor has become incapable. Accordingly, powers of attorney, like representation agreements, can be only be used effectively when people plan for future contingencies.

b. Capacity

As stated above, the donor must be capable to create a power of attorney. A power of attorney will be valid where the donor is found to be capable of understanding the nature and effect of the Act by which the power is conferred, but the donor does not need to be capable of managing their own property and affairs on a regular basis and does not need to be capable of understanding the nature and effects of the acts which the attorney is authorized to perform. It is important to note that capacity requirements are not provided for in the *Power of Attorney Act*, however the courts have found that a donor will be found to have the requisite capacity to create a power of attorney if they are capable of understanding:

- that the attorney will be able to assume complete authority over the donor's affairs;
- that the attorney will have the authority to do anything with the donor's property which the donor could have done;

- this authority may continue even if the donor becomes mentally incapable; and
- in the event of the donor's incapacity, the power of attorney will become irrevocable.

c. **Attorney**

Any capable and willing adult may be appointed as another person's attorney. Although the word attorney is used, the attorney does not have to be a lawyer. If a person has no one to appoint, they can apply to have the Public Guardian and Trustee agree to be their attorney. The office of the Public Guardian and Trustee will charge a fee for their services, while another attorney is not required to be remunerated. All powers of attorney are terminated upon the death of the donor, and can be revoked at any time by a capable donor. Also, it should be noted that one of the disadvantages of a power of attorney is that the donor is unable to appoint a person to monitor the actions of the attorney, as provided for in representation agreements, and thus the attorney may have more opportunity for misfeasance. It is therefore very important to trust the person who you appoint as your attorney.

d. **Real Estate**

If an attorney is being given the authority to deal with a donor's real estate, there are a few additional considerations. According to the *Land Title Act*, a power of attorney which grants to the power to deal with land transfers or land title registration automatically expires three years after its enactment unless it is an enduring power of attorney or the agreement expressly exempts itself from the rule. Additionally, the signatures of the donor and the attorney must be notarized by a lawyer.

e. **Recent Changes**

In the Spring of 2007, the BC Legislature introduced the *Adult Guardianship and Planning Statutes Amendment Act, 2007* (Bill 29) which is a revised version of Bill 32, the *Adult Guardianship and Personal Planning Statutes Amendment Act*, which was introduced in 2006 but died at the end of the 2006 Session. Bill 29 passed Third Reading on October 22, 2007, and although not yet proclaimed, it is important to understand the some of the changes being introduced with respect to the *Power of Attorney Act*. It is important to know that many of the amendments to the *Power of Attorney Act* reflect the BC Legislature's plan to have the *Representation Agreement Act* co-exist with the *Power of Attorney Act* (which was originally planned to be phased out in favour of the *Representation Agreement Act*).

Most of the new provisions relate to the enduring power of attorney. The current enduring provision under the *Power of Attorney Act* will be repealed and a new Part 2 will be enacted to deal with enduring powers of attorney. The definition of enduring power of attorney expressly includes

a power of attorney that comes into effect when the person becomes incapable (i.e. the springing or triggering power of attorney is allowed), thus alleviating the murkiness of the springing mechanism. In other words, the power of attorney will continue to be effective even after the adult loses capacity.

In addition, the *Power of Attorney Act* will now include a presumption of capability provision and an express definition of what renders an adult incapable of granting an enduring power of attorney. The capacity test provides that an adult will be incapable of understanding the nature and consequences of the proposed enduring power of attorney if the adult cannot understand all of the following:

- the property the adult has and its approximate value;
- the obligations the adult owes to his or her dependents;
- that the adult's attorney will be able to do on the adult's behalf anything with respect to the adult's financial affairs except make a will, subject to the restrictions contained in the enduring power of attorney;
- that unless the attorney manages the adult's business and property prudently, their value may decline;
- that the attorney might misuse the attorney's authority;
- the adult may, if capable, revoke the enduring power of attorney;
- any other prescribed manner.

The witnessing provisions will also be altered and will include that an enduring power of attorney must be signed by the adult in the presence of two witnesses and both witnesses in the presence of an adult, unless one of the witnesses is a lawyer or a notary. Witnesses cannot be a person named in the enduring power of attorney, a spouse, child, parent or employee or agent of a person named. The attorney must sign the enduring power of attorney in the presence of two witnesses, but only one if a notary or lawyer is the witness. With respect to who can act as attorneys, a person who provides personal care or health care services to the adult for compensation or is an employee of a facility in which the adult resides and through which the adult receives personal care or health care services cannot act as attorneys. However, a spouse or near relative who provides care for compensation is not prohibited from acting as an attorney.

The enduring power of attorney will be effective on the latest of the date by which the enduring power of attorney has been signed by both the adult and the attorney, a date stated in the enduring power of attorney as being the effective date and the date an event described in the enduring power of attorney as bringing the power of attorney into effect is confirmed to have occurred. In addition, new provisions in the *Power of Attorney Act* provide for when the authority under an enduring power of attorney is suspended or ends, for example, if the attorney is the spouse and the marriage or marriage-like relationship ends, if the attorney is convicted of a prescribed offence or the adult is the victim, the authority will end.

The enduring power of attorney will also be terminated on the terms contained in the power of attorney, if the adult dies, the court terminates it or it is revoked. The attorney may resign on giving written notice to the adult, or if the adult is incapable, by giving notice to the spouse, close relative or close friend of the adult. On the other hand, for an adult to terminate an enduring power of attorney, the adult must give written notice to each attorney to revoke or change the power of attorney.

Enduring powers of attorney made outside of BC, but in compliance with any prescribed requirements, will be deemed to be an enduring power of attorney under the *Power of Attorney Act*. This provision will help facilitate the recognition of powers of attorney made in other jurisdictions. More comments will be made on this topic below. In addition, to ease the transition, an existing enduring power of attorney made under the current provisions of the *Power of Attorney Act* will be deemed valid as an enduring power of attorney under the new provisions. Finally, in the event of a conflict between the provisions of an enduring power of attorney and those in a representation agreement, the enduring power of attorney provisions will prevail.

f. Cross Border Issues

One last area to consider is that of the effectiveness of powers of attorney outside the power of attorney's originating jurisdiction. Currently, the mechanisms in place for inter-provincial and international recognition are largely inadequate. Situations may arise where there are competing caregivers for an adult, but the caregivers live in different locations and may result in difficulties enforcing any previously made arrangements, especially if the adult in question is moved out of the jurisdiction where the previously made arrangements were made.

Even the most effective document available locally may not be recognized and enforced cross-border as such mechanisms are only in their infancy. In Canada, the general trend between provinces is to have documents made in one jurisdiction recognized in another, but such reciprocal-orders legislation is generally internal. With respect to the international front, the Hague Convention on International Protection of Adults was created in January 2000, but only Germany, the Netherlands, France, Switzerland and the United Kingdom have signed; however the

Convention has only been ratified in respect of Scotland, but there are plans to ratify in respect of England and Wales in the future. Canada has not yet ratified the Convention.

The Convention sets up measures to determine which jurisdiction has authority to take steps to protect the person or property of an adult who, by reason of an impairment or insufficiency of their personal faculties, is not in a position to protect his or her interests. The habitual residence of an adult is specified as the place that has jurisdiction, rather than the place where they are at the time of the application. The Convention also provides for the recognition and enforcement of such measures in all contracting states.

For Canada to ratify, the provinces must ratify the Convention first (as the provinces retain power under the division of powers) and then the federal government must file papers with the Hague Convention to make it effective. However, so far only Saskatchewan has ratified the Convention. In addition, while most provinces have recently reformed their guardianship laws, including BC under Bill 29, or are in the process of doing so, the Convention has not been part of this reformation. Ratification by the United States may help speed up the process of Canada ratifying this Convention, but the Convention is currently only under consideration in the United States. Therefore, until Canada ratifies the Convention, there may be very little protection for powers of attorney created in Canada with respect to the recognition and enforcement of powers across the Canadian border; and even then, the Convention may not have the ability to provide protection should a state choose not to follow the Convention's measures.