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ENDURING POWERS OF ATTORNEY INFORMATION PACKAGE

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What is the Difference between a Will, Power of Attorney and Personal Directive?

A **Will** (or “Last Will and Testament”) is a document in which you state how you want your Estate to be distributed after you pass away. In your Will you appoint a Personal Representative (used to be called the executor or executrix) to oversee the administration of your Estate and outline how you want your property distributed. If you have minor children, you can appoint a Guardian and make arrangements for their care.

An **Enduring Power of Attorney** is a document in which you appoint an “Attorney” and give them the power to make decisions relating to your financial matters while you are alive. An Enduring Power of Attorney can come into effect immediately or when you lose the capacity to make your own decisions (e.g., accident, Alzheimer’s, etc). Your Attorney can be any person you choose and does not have to be a lawyer.

A **Personal Directive** is a document that states, in plain language, your views and wishes about the personal care you would like to receive when you are unable to speak for yourself. In this document you give your “Agent” the legal authority to make decisions on your behalf about such matters as health care, where you live, who can visit you, designating who will take over the care and education of your minor children and other personal care issues. A Personal Directive can also include a Living Will.

Why do I need a Power of Attorney?

While the possibility of illness or incapacity is something no one likes to think about, you can use an Enduring Power of Attorney to make decisions now that can help to protect your assets, eliminate stress on you and your loved ones, and give you the peace of mind that comes with knowing that a plan is in place if you are unable to take care of your money and property yourself. An Enduring Power of Attorney can also mean your family won't have to go through the stress and expense of having the court declare you a dependant adult.

The most common reasons for creating a Power of Attorney are:

1. To facilitate financial and property transactions that need to be completed when you are away from Alberta for an extended period.
2. To ensure that your financial affairs are properly administered as you age and become unable to take care of them yourself.
3. To ensure that your financial affairs are properly administered in the event of an unexpected illness or injury.

The person signing a Power of Attorney is called "the donor". As donor, you can sign a general Power of Attorney that allows your Attorney to manage all your financial affairs, or you can sign a specific Power of Attorney that gives your Attorney defined powers and duties, such as the power to sign a transfer of land or access a bank account to pay your household bills.

What is the Difference between a “Normal” and an “Enduring” Power of Attorney?

A normal (non-enduring) Power of Attorney ceases to have effect when the Donor becomes mentally incompetent and it is not very useful for planning for future disability. An Enduring Power of Attorney, on the other hand, continues to be in effect after the Donor suffers a loss of capacity and becomes mentally incompetent.

What is the Difference between an Immediate and a Springing Power of Attorney?

An **immediate** Power of Attorney gives your Attorney the power to manage your financial affairs as soon as it is signed. This type of Power of Attorney is typically used if you have elderly parents that are competent but have physical limitations on their ability to manage their finances or when an individual is leaving the country and wants someone to manage their property or complete a transaction while they are away. An immediate Power of Attorney can be either enduring or non-enduring.

A **springing** Enduring Power of Attorney takes effect at some future date or on the occurrence of a condition that is specified in the document. Usually, the event that triggers a springing Power of Attorney into effect is the mental disability of the Donor. A springing Power of Attorney allows individuals to prepare for future incapacity due to age or an accident.

Is my Attorney required to disclose my personal financial information to my children or alternate Attorneys?

Your Attorney needs to disclose enough information to allow them to carry out their duties and abide by the law. In terms of disclosing additional information, your privacy must be respected unless you specifically authorize or direct your Attorney to disclose your personal financial information in your Power of Attorney. We often find that our clients who appoint one or two of their children to act as their Attorney want their Attorney's transactions disclosed to all of their children.

What are the Powers and Responsibilities of an Attorney?

The Attorney is an agent with authority over the property of the Donor. While the Donor has capacity under an immediate Power of Attorney, the Attorney is under a legal duty to follow the Donor's instructions. If the Donor loses capacity (i.e. is legally incapable to making his or her own decisions) and the Enduring Power of Attorney "springs" into effect, the Attorney becomes a *fiduciary* and from that point forward, must act only in the best interests of the Donor and to use the property for the Donor's benefit. Essentially, the Attorney steps into the donor's shoes with respect to financial decision making and can do things such as

- access and manage your bank accounts,
- sign cheques and other legal documents on your behalf,
- manage your investments and real property,
- pay your debts and expenses,
- hire someone to care for you,
- operate your business,
- start or defend lawsuits on your behalf,
- file and pay your taxes, and
- access your safety deposit box.

You can also give your Attorney specific powers to:

- buy, mortgage or sell your residence or any investment properties you own;
- use your money for the benefit of your financially dependent children who are over 18 (for example, if your adult children are attending a post-secondary school or have a disability);
- obtain a copy of your Will;
- make gifts to your family members on special occasions such as birthdays; and
- continue to make donations to charities and/or churches consistent with gifts you made when competent.

An Attorney cannot change your Will or amend your designation of beneficiary on your RRSPs, pensions or life insurance.

How do changing relationships effect my Power of Attorney?

In Alberta, entering a common law relationship and being in an adult interdependent partnership does not affect your Power of Attorney. A Power of Attorney signed before you started the relationship remains valid. Similarly, a Power of Attorney continues to be valid and in effect if you marry, separate or divorce. It is therefore important to review your Enduring Power of Attorney in any of these "Turning Points" in your life. It is unlikely that your old Power of Attorney still expresses your wishes, so you will have to sign a new Power of Attorney to protect yourself and your assets.

Should I pay my Attorney?

This is up to you. In your Power of Attorney, you can provide guidelines for compensation for your Attorney for their work and reimbursement for their out of pocket expenses. If you do not, the Attorney can apply to the court for compensation.

How often should I review my Enduring Power of Attorney?

You should review your Enduring Power of Attorney at least once a year to make sure it still represents your wishes. You should also review your Enduring Power of Attorney when you reach any of these Turning Points in your life:

- you, your Attorney or your children move from one province to another;
- your children turn 18;
- you have or adopt a child;
- you (re)marry, enter a common law relationship, separate or divorce;
- you buy a new home;
- you retire;
- you receive a large sum of money or other valuable property (such as an inheritance or a lottery win); or
- You start, buy into or leave a business.

Who can act as my Attorney?

Any adult can be appointed as your Attorney (it does not have to be a lawyer). Most people turn to a spouse, a child, a relative, a family friend, a professional or even a financial institution. You can also appoint more than one Attorney and require that they agree on how to manage the donor's property. Should you decide to appoint multiple Attorneys, however, you should outline a dispute resolution method. While the Attorney is not required to be a resident of Alberta, we do recommend it.

What Qualities should my Attorney have?

Your Attorney should have certain qualities, including:

1. Willing to do the job and able to put sufficient time and effort into it
2. Intelligent enough to do the job
3. Free from conflict of interest (as much as possible)
4. Able to resist any undue influence
5. Aware of your goals and desires
6. Capable of accounting for all transactions carried out in the administration of your property
7. Most importantly, trustworthy

We recommend that you ensure that the Attorney is aware of their appointment in your Enduring Power of Attorney and that they agree to being appointed.

What are the requirements for an Enduring Power of Attorney?

In Alberta, an Enduring Power of Attorney must:

1. Be in writing and dated
2. Be signed by the donor in the presence of a witness
3. Be signed by the witness in the presence of the donor
4. State that it is to continue notwithstanding any mental incapacity or infirmity of the donor that occurs after the execution of the Power of Attorney or that it is to take effect on the mental incapacity or infirmity of the donor

What Happens if I Pass Away?

Your Enduring Power of Attorney terminates and the Attorney must account to the Personal Representative that you appointed in your Will for their decisions.

What Happens if I become Incompetent without an Enduring Power of Attorney?

There is no automatic appointment of your spouse or child if you become incompetent without a Power of Attorney. It may be necessary to make an application to the Court of Queen's Bench to get someone appointed to manage your property. This application to Court may require that your family hire a lawyer and, if contested, this application can be both expensive and drawn out. Nobody will be able to access your assets (except for some joint assets) until the court appoints a Trustee (unless the court permits the use of your funds while the case is being processed through the court). The court will require a detailed breakdown of your assets and property in public and will further require that your trustee provide an accounting every 2 years.

What about Joint Assets?

Joint tenancy is a term used to describe the shared ownership of an asset legally registered in two names. For example, a joint bank account allows either individual to access to the funds. While holding assets jointly can accomplish some of the same objectives as a Power of Attorney, it is not as flexible. In some situations, you will need the consent of both parties to deal with joint property, which is not possible if one is incapacitated. Another concern is that your lack of control over any assets held in joint names. For example, if your assets are held jointly with an adult child who is sued in a divorce, bankruptcy or other legal proceeding, then your assets may be attached to pay a judgment against your child.

Turning Point Law is a father – son Wills, Estates and Trusts law firm. Paul McLaughlin (father) and Andrew McLaughlin (son) are committed to helping our clients find peace of mind through plain language drafting of Wills, Enduring Powers of Attorney, Personal Directives and Trusts. We also assist our clients with Applications for Grants of Probate and Grants of Administration, and with the Administration of Estates.

Our office is located in Sherwood Park, Alberta, and we serve clients in Strathcona County, Fort Saskatchewan, Edmonton, St Albert, Leduc, Camrose, Tofield and Spruce Grove. We also serve clients in Red Deer and Calgary.

Please do not hesitate to contact our office with any questions you may have.