

Controlling your financial future

A guide to springing and enduring powers of
attorney in the Northwest Territories

Public Trustee for the Northwest Territories

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INTRODUCTION

As adults, we make decisions about our lives everyday. Many of those decisions deal with our financial affairs, such as whether to buy a car, sell or purchase a house, invest our money, etc. We all recognize that, at some point in our lives, it is possible that we may not be able to make these decisions on our own because of illness, injury or disability. For example, we might be seriously injured in a car accident and be temporarily unable to make our own decisions. Or, we may acquire a serious illness that affects our ability to make decisions about our finances.

Like making a will to plan for the distribution of our belongings after our death, it is never too early to plan for a time when we might not be able to make day to day decisions about important areas of our lives. Adults of any age, at some time in the future, may not be able to make their own decisions. Planning ahead for these events allows us to make our wishes known so that others can follow them.

The government of the Northwest Territories has enacted new legislation, the Powers of Attorney Act, to allow individuals to appoint someone else to handle their financial affairs. This legislation, which was brought into force on June 1, 2002, deals mainly with “springing” and “enduring” powers of attorney. The purpose of this guide is to help you understand springing and enduring powers of attorney, new tools that can help you plan for the future. As with any legal document, it is recommended you consult a lawyer prior to the signing of a power of attorney.

WHAT IS A POWER OF ATTORNEY?

A power of attorney is a legal planning document that enables us to choose another person to make important financial decisions for us in the future while we are living (unlike a will which only takes effect after our death). It gives us some control over our lives when we may not be capable of making decisions about our financial and legal affairs. It gives us an opportunity to make choices about who will make those decisions and how they will be made.

You do not have to make a power of attorney. It’s your choice. It is up to each of us to decide whether we want to make a power of attorney. It is simply a tool we can choose to use to plan our future.

WHAT ARE SPRINGING AND ENDURING POWERS OF ATTORNEY?

A **springing power of attorney** is a power of attorney that comes into force at some time in the future chosen by the person making the power of attorney. The time could be a specific date, a date by which certain events have occurred, or upon the maker of the power of attorney becoming incapable of managing their financial affairs.

An **enduring power of attorney** is a power of attorney that comes into force as soon as it is signed and which continues to be in effect after the person who made it becomes incapable of managing their financial affairs.

WHAT KINDS OF DECISIONS CAN BE COVERED BY A POWER OF ATTORNEY?

You can include almost any kind of financial or legal decision making authority in a power of attorney. For example, you could give your attorney the power to deposit and withdraw funds in your bank account, open up new bank accounts, make investments, sell or buy a house, pay money to your children or spouse, run your business or company and retain a lawyer to act on your behalf.

WHO CAN MAKE A POWER OF ATTORNEY?

A person who wishes to make a power of attorney must:

be an adult (over 19 years of age),

be mentally capable of understanding the power of attorney in general and understand the following matters in particular;

- (a) the nature of the donor's property that will be subject to the power of attorney and its approximate value;
- (b) the donor's obligations to his or her dependants;
- (c) that the attorney will, under the power of attorney and subject to its provisions, be able to do on the donor's behalf anything in respect of the donor's property that the donor could do if mentally capable, except make a will;
- (d) that the attorney must account for his or her dealings with the donor's property;
- (e) that the power of attorney may be subsequently revoked by the donor, if he or she is mentally capable of doing so;
- (f) that the donor's property that will be subject to the power of attorney may decline in value unless the property is prudently managed by the attorney;
- (g) that the attorney may possibly misuse the authority given to him or her under the power of attorney.

WHO SHOULD I CHOOSE TO BE MY ATTORNEY?

The choice of an attorney is a very important personal decision. You may have several choices for your attorney. Many persons will choose an adult family member or friend. The person you choose should be someone you trust and who understands the values and beliefs that guide your decision making. You may also choose the Public Trustee as your attorney.

Some things to consider when choosing an attorney:

- Choose someone who is willing to act as your attorney.

- Choose someone who is easily contacted and likely to be available.
- Choose someone who will be able to help when the time comes. For example, you may wish to choose someone who is in close contact rather than someone who lives a long way away or someone who travels extensively.
- Discuss your decision to appoint an attorney with the person you are considering as your attorney **before** making your power of attorney
- Discuss your choice of an attorney with the important people in your life when possible. You may want to choose someone who will be able to get along with the other important people in your life.

CAN I REVOKE OR AMEND MY POWER OF ATTORNEY?

You can revoke or amend your power of attorney at any time if you are still capable of understanding the nature and effect of the document.

WHAT IF MY ATTORNEY DOES NOT HANDLE MY FINANCES CORRECTLY?

If your attorney does not manage your affairs properly, you may revoke your power of attorney if you are still capable of doing so. If you are not capable, then any interested person may make an application to the Supreme Court of the Northwest Territories to have your attorney removed from that position.

WHAT SHOULD I DO WITH MY POWER OF ATTORNEY?

If you have made a springing power of attorney, you should keep it in a safe place such as a safety deposit box and give a copy to your proposed attorney. You may also file a copy at the office of the Public Trustee.

If you have made an enduring power of attorney you should give it to your attorney and keep a copy for yourself. You may also file a copy at the office of the Public Trustee.

WHAT IF I HAVE ALREADY SIGNED AN ENDURING OR SPRINGING POWER OF ATTORNEY?

The new legislation “grandfathers” powers of attorney that were made prior to the legislation coming into force. You should check with your lawyer to ensure your power of attorney fits within the “grandfathering” provisions.

WHAT HAPPENS TO MY POWER OF ATTORNEY WHEN I DIE?

When you die, your power of attorney is terminated. You should have a will appointing an executor/executrix who will then handle the financial affairs of your estate.

COMPLETING THE POWER OF ATTORNEY FORMS

The following sections outline how to complete the forms for springing and enduring powers of attorney.

Date, Name of Donor, Address of Donor

The date on which the document is signed should be inserted at the top of the form, followed by the full name of the donor. If you go by other names you should mention those as well. For example, Charles Franklin Smith aka (also known as) Charlie Smith aka Chuck Smith. The address should include the community name and the name of the territory/province.

Explanatory Notes

These notes should be read over carefully before signing.

Appointments and Directions

Section 1

State the full name of the proposed attorney as well as the name of the community that they reside in and the name of the territory/province. Any number of attorneys may be appointed to act jointly. However, as more attorneys are appointed it may be more difficult to co-ordinate decision making. You may not appoint a minor (someone under the age of 19), a mentally incapacitated person or an undischarged bankrupt as your attorney.

Section 2

State the full name of the proposed alternate attorney. The address should include the community they reside in as well as the name of the territory/province. An alternate attorney is one who can act in place of your first attorney or any other joint attorney if they are no longer able to act.

Section 3

For an **enduring power of attorney** there are no changes to be made to this section.

For a **springing power of attorney** you **must**:

(a) indicate the date or event upon which the power of attorney will come into force. You should make sure that you choose a date or event that is straightforward and easy to understand. Some examples could be as follows:

- “When I become mentally incapable of managing my financial affairs”

- “ On my 75th birthday”

(b) indicate whether you are naming one or more persons (declarants) who will determine whether or not the date or event you have specified in subsection (a) has occurred. For example, you could name your spouse and one or more of your children to determine if your mental abilities have reached the stage where you can no longer manage your financial affairs. You could also name a doctor, psychologist or a friend as well. It is recommended that you indicate at least two declarants so that the burden of such a decision does not rest with just one person.

If you have indicated in subsection (a) that the power of attorney comes into force when you are mentally incapable and you have not named one or more declarants, then two doctors or psychologists can make the decision as to whether you are mentally capable.

Section 4

This section is optional and allows you to appoint a friend or relative (a recipient) to receive reports on your financial affairs from your attorney. The purpose of the section is for you to have someone review the way in which your attorney is handling your financial affairs to ensure they are being managed properly. There is no duty on this person to act but it is expected that if problems are noticed they will be brought to the attention of the Supreme Court or the Public Trustee. If you do not name a recipient then your attorney must send an annual accounting to your nearest relative.

Section 5

This section is optional. You may restrict the powers that you give to your attorney in any way. You should give very careful consideration to this section. For example, you may restrict the ability of your attorney to sell your house. However, if you did this and your house needed to be sold in the future, a costly court application may be required. If you do not place any restrictions or conditions on your attorney they will be able to manage all of the financial assets that you have now and that you may have in the future.

Section 6

This section is optional. You may wish to allow your attorney to receive compensation. Under the **Trustee Fee Regulations** compensation is set out as follows: 2.5% on capital and income receipts, 2.5% on capital and income disbursements, and .4% per year on the average value of assets. You may also state different amounts or rates that you wish your attorney to receive.

Section 7

This section is optional. You may revoke any previous powers of attorney here. You should ensure that you do not have any overlapping powers of attorney whereby you have given the same powers to more than one person.

Signature of Donor and Witness

You must sign your power of attorney in the presence of a witness and the witness must sign in your presence. A person who is physically unable to sign a power of attorney can direct someone to complete and sign a power of attorney on his or her behalf. Neither your proposed attorney nor the spouse of the attorney may sign as a witness. The witness must be at least 19 years of age and mentally capable.

Acceptance of Appointment by Attorney

This section is optional but it is recommended that it be completed so that it is clear that your attorney knows that you have appointed them. It should be dated and a person other than the donor, the attorney or the attorney's spouse, should sign as a witness.

DEFINITIONS

Attorney	means a person authorized to act for a donor under a power of attorney
Donor	means an individual who gives a power of attorney
Declarant	someone name in a springing power of attorney who can declare that a date or event has occurred which brings the power of attorney into force
Recipient	someone named in a power of attorney to receive financial reports from the attorney
Enduring power of attorney	a power of attorney that comes into force immediately and continues if the donor becomes mentally incapable
Springing power of attorney	a power of attorney that comes into force at some point in the future chosen by the attorney.