

# power of attorney

how to use a power of attorney and what to do if there are problems



# power of attorney

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## public legal education association of saskatchewan

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## Introduction

*Since Sophie fell and broke her hip last winter it is painful for her to walk and she has difficulty driving. Friends and family have been very helpful, but Sophie needs someone to do her banking so she can get her bills paid and re-invest some funds. Sophie's daughter tried to explain the situation to the bank and make a withdrawal on Sophie's behalf, but the bank would not allow it.*

\*\*\*\*\*

*Fred has just found out he has early Alzheimer's and he wants to give someone the authority to make some personal decisions for him, such as where he will live, in the event that he can no longer make those choices for himself.*

\*\*\*\*\*

There are times when you may want someone else to handle some or all of your affairs.

A power of attorney is a legal document that allows you to give someone else the authority to act on your behalf. You name another person in the document to do certain things for you as your legal representative. In legal terms you are called a grantor and the person you name to act for you is called an attorney.

## Who can give a power of attorney?

You can give someone power of attorney if you are...

- at least 18 years of age
- mentally competent
- capable of understanding what you are doing

# Who can be given a power of attorney?

You can appoint someone as your attorney if he or she is...

- at least 18 years of age
- able to understand information relevant to making decisions he or she is authorized to make under the power of attorney
- able to appreciate the consequences of making or not making decisions he or she is authorized to make under the power of attorney

There are certain people who cannot be appointed to act under a power of attorney. A person who is an undischarged bankrupt cannot be appointed under a power of attorney to deal with your financial affairs.

People who have been convicted, within the last ten years, of a criminal offence relating to assault, sexual assault, other acts of violence, intimidation, criminal harassment, uttering threats, theft, fraud or breach of trust cannot be appointed to act under a power of attorney unless they have been pardoned or the grantor consents in writing. The consent must acknowledge the conviction and be made while the grantor is still mentally competent.

A person whose occupation or business involves providing personal care or health care services to you cannot be appointed as your attorney.

Other than these restrictions, you can name anyone you choose as your attorney. It should be someone you trust. It can be a relative, friend, lawyer, or an officer of a bank or trust company. When deciding who to appoint you may want to consider what kind of decisions you are giving them the

authority to make in what circumstances. The person you choose can refuse to take on the responsibility, so it is important to discuss the matter with them first.

## Types of Powers of Attorney

When you appoint someone to act for you under a power of attorney, there a number of choices that must be made about what kinds of decisions the attorney will be able to make and when the attorney can act for you. It is important to consider the options and have a power of attorney document that suits your needs.

### ***Enduring Powers of Attorney***

When appointing someone to act for you under a power of attorney you must decide if you want your attorney to be able to continue to act for you if you lack capacity. Capacity means...

- being able to understand information that is relevant to making the kind of decisions in question
- being able to appreciate the consequences of making or not making those decisions

A power of attorney that is a non-enduring power of attorney ends if the grantor loses capacity.

### ***Contingent Enduring Powers of Attorney***

A contingent enduring power of attorney only comes into effect if you lose capacity. Whether or not you have lost capacity can be determined by one or more individuals chosen by you and named in your contingent enduring power of attorney. Persons with the authority to make this decision cannot be the attorney or a member of the attorney's family. If no one is named by you or the person(s)

you named cannot make the decision, for example because they have died, the opinion of two professionals is required. The legislation names those professional groups that are allowed to make this decision.

### ***Personal and Property Powers of Attorney***

A property attorney can be given the authority to make decisions about property and financial matters. This could include the ability to withdraw money from bank accounts, pay bills and sell or purchase property. It could also include providing for the maintenance, or education of your spouse and/or dependant children. A property attorney cannot make a will for you or change your existing will.

A personal attorney can be given the authority to make decisions about your personal affairs. This could include deciding where you should live and what kind of help you need around the home. A personal attorney cannot be given the power to make health care decisions for you. This must be done by making a health care directive. For more information on health care directives see the PLEA pamphlet *Health Care Directives*.

You can appoint a personal attorney, a property attorney or both. You can only appoint a personal attorney if you chose to make an enduring power of attorney. If you appoint both a property and a personal attorney, you can choose to appoint the same person as both or appoint two different people.

If you appoint a property attorney and a personal attorney and they disagree, the decision of the property attorney will be preferred if it is not clear by the terms of the power of attorney document who should make the decision and the decision involves spending money. Alternatively, if the two attorneys disagree either one can ask the court to give direction.

### ***General and Specific Powers of Attorney***

In addition to deciding whether to appoint a personal attorney, a property attorney or both, you can choose to give an attorney general authority or specific authority. If you give your attorney general authority, he or she can make decisions regarding your financial or personal affairs as the case may be.

If you only want your attorney to make certain decisions you can say this in the power of attorney document. For example, a property attorney may be given the power to pay certain bills from a chequing account or you may give a personal attorney authority to decide on a place of residence for you.

### ***Duties of an Attorney***

An attorney can do the things that you have given him or her authority to do in the power of attorney document. You can still act for yourself unless you lack capacity.

Anyone who is given authority to act for someone else by power of attorney has certain obligations concerning how that authority can be used. An attorney must act honestly, in good faith, in the best interests of the grantor, and with the care that could be reasonably expected of a person with the attorney's experience and expertise. An attorney must also, wherever possible, take into consideration the wishes of the grantor in carrying out his or her duties.

Unless an enduring power of attorney states otherwise, an attorney cannot give someone else the authority to make decisions that the attorney is given the authority to make.

## Giving a Power of Attorney

You may want to consult a lawyer about making a power of attorney document. You can also do this yourself.

There are different requirements for creating a power of attorney depending on the type of appointment being made. A non-enduring power of attorney should be in writing and signed by you. The attorney does not need to sign the document.

If you want the power of attorney to be enduring (continue even if you later lack capacity) there are additional requirements. The document must clearly state that you want the person to be able to continue to act for you in the event that you lack capacity to act for yourself. The document must be in writing and be signed and dated by you.

The document must also be witnessed. It can be witnessed by a lawyer who has given you legal advice on the document. Alternatively it can be witnessed by two adults with capacity. The witnesses cannot be the attorney being appointed or a family member of either the attorney or yourself. Witnesses must complete a witness certificate in the form required by the legislation.

If you meet the requirements described, it is not necessary to use any particular form for a power of attorney document although you may choose to use the form included in the legislation. Witness certificates on the other hand, if required, do have to be completed using the form authorized by the legislation. Forms for witness certificates and for creating an enduring power of attorney are available online under the heading "legislated forms" at [www.qp.gov.sk.ca](http://www.qp.gov.sk.ca).

## Fees

An attorney can charge a reasonable fee for work they do for you. This fee can be paid out of your assets. Your attorney must give you an account of any money he or she was paid every year. If you lack capacity, this accounting is made to someone who you have named in the power of attorney document for this purpose or, if no one is named, to your most immediate and available family member.

## Accounting

Someone you appoint as your attorney must give you an accounting anytime you request one. If you lack capacity, an accounting can be requested by a person you have named for that purpose in the power of attorney document. If no person is named, an adult member of your family can request an accounting.

If you have named both a personal and property attorney, they can request that the other do an accounting. If you or someone asking on your behalf cannot get an accounting from the attorney, the Public Guardian and Trustee can be asked to direct that the attorney make an accounting.

As well, any interested party can ask the Public Guardian and Trustee to direct that an accounting be made. If the Public Guardian and Trustee has directed that an accounting be made and the attorney still does not give an accounting, an application can be made to court.

# Ending a Power of Attorney

## ***Ending a Non-Enduring Power of Attorney***

Either you or the attorney can cancel a power of attorney at any time. You can cancel it by giving written notice to the attorney. The attorney can cancel the power by telling you that they are ending the power. In this case they should return the document to you. All organizations and companies dealing with the attorney should be notified in writing that the power of attorney has been cancelled.

A power of attorney may also come to an end on a date specified in the document. A specific power of attorney ends when the task is completed or a specified time or event occurs. For example, a power of attorney to sell certain real estate ends when that property is sold.

The power of attorney ends if you become mentally incompetent, unless you have given an enduring power of attorney. A power of attorney also ends if your attorney becomes mentally incompetent, your attorney or you die, or become bankrupt.

## ***Ending an Enduring Power of Attorney***

An enduring power of attorney can be ended in much the same way as a non-enduring power of attorney. You can cancel it by giving a written revocation to the attorney. You can only do this if you have the capacity to understand the nature and effect of the enduring power of attorney and the effect of ending it.

As well, the attorney can cancel the enduring power of attorney by giving you a written resignation. If you lack capacity the written notice can be given to another attorney,

if you have appointed more than one. If there are no other attorneys, your most immediate and available family member will be given the written resignation.

An enduring power of attorney, like a non-enduring power of attorney, ends if you or your attorney dies. It does not end if you lack capacity but will end if your attorney lacks capacity. If you appoint your spouse as an attorney, the enduring power of attorney will end if you stop living together as spouses because you have decided to end your relationship.

An enduring power of attorney will also end if the court appoints someone else to make the decisions for you, or the Public Guardian and Trustee is given the authority to make decisions for you. For example, a power of attorney appointing a property attorney would end if the court appointed a property decision-maker for you and a personal power of attorney would end if the court appointed a personal decision-maker for you.

Any interested party can apply to court to have a power of attorney ended if they think that an attorney had abused his or her authority. If the court is satisfied that this is the case the court can end the power of attorney.

An enduring power of attorney will also end if the attorney no longer meets the conditions for being appointed as an attorney. This means that an enduring property attorney cannot continue to act if he or she becomes bankrupt and that an enduring power of attorney ends if the attorney starts providing personal or health care services to you or is convicted of one of certain criminal offences.

# free legal information

PLEA publications are available free through your local library, at distribution points throughout Saskatchewan, and electronically on our web site at

[www.plea.org](http://www.plea.org)

## *pamphlets*

Arrest (also available in Plains and Woods Cree)	Health Care Directives
Assault	HIV/AIDS, The Law and You
Babysitting	Jail or Bail
Becoming a Lawyer	Joint Tenants or Tenants in Common
Being a Witness in Criminal Court	Legal Careers
Bicycling	Names and Changes of Names
Busted	Peace Bonds
Child Abuse and Neglect	Renting a Place to Live
Child and Spousal Maintenance	Sexual Assault
Child Protection Services	Social Assistance: Appeals
Custody and Access	Social Assistance: Applying
Debts	Social Assistance: Special Needs, Advances, Overpayments
Going to a Lawyer	Unmarried Parents
Going to Criminal Court	Youth Criminal Justice Act
Going to Youth Justice Court	
Harassment, Intimidation and Threats	

## *booklets*

Abuse of Older Adults	Environmental Law and the Farmer
Abusive Relationships	Farm Financial Difficulties
Administrative Law	Human Rights
Automobiles - Buying and Selling	Non Profit Organizations
Buying and Selling a Home	Older Adults and the Law
Buying Stuff	Patients Rights
Consumer Contracts	Power of Attorney
Consumer Fraud	Renting a Home
Consumer Wisdom	Single Parents
Criminal Law	Small Claims Court
Death in the Family	Special-care Homes
Debts and Credit	Warranties and Guarantees
Domestic Relations (Ending a Spousal Relationship)	Wills and Estates
Drugs, Alcohol and the Law	

Please note that some of the listed publications may be available in electronic format only.