

POWERS OF ATTORNEY



By writing a Power of Attorney, you can give another person authority to act on your behalf in case you are sick or become unable to make decisions about your health care or finances.

What is a Power of Attorney?

A **Power of Attorney** is a legal document that lets you give another person authority to act on your behalf during your lifetime.

If you are giving someone power of attorney, you are called the **donor**. The person you are giving power of **attorney** to is called the attorney (even if they are not a lawyer).

The law does not require you to prepare a Power of Attorney document. But it is a way for you to choose who will act for you if you are unable to do so. It has no legal effect after your death.

Note: "Power of Attorney" is the document. The power you give to an attorney is written in lower case letters, as in "power of attorney."

If I have given someone my power of attorney, can I still act on my own behalf?

Yes. If you give someone your power of attorney, you can still make your own decisions until you become unable to do so.

What is an Enduring Power of Attorney?

An **Enduring Power of Attorney** is a special Power of Attorney document that clearly says that the authority to act on your behalf continues even if you become mentally **incompetent**.

A Power of Attorney that is not an Enduring Power of Attorney will become invalid and cannot be used if you become mentally incompetent. In that case, a **guardian** may need to be appointed to handle your affairs. For more information on adult guardians, see the section *Guardianship of Adults*.

Should I have an Ordinary Power of Attorney or an Enduring Power of Attorney?

The kind of Power of Attorney document you have depends upon your needs. Every situation is different, so you should speak with a lawyer about what is best for you in your situation.

If you want the person named in your Power of Attorney to be able to continue to act if you become mentally incompetent, then you will need to have an Enduring Power of Attorney.

If you already have an **Ordinary Power of Attorney**, talk with your lawyer about whether you should replace it with an Enduring Power of Attorney.

What is Springing Power of Attorney?

A **Springing Power of Attorney** is a specialized Enduring Power of Attorney document which states at what point it will “spring” into effect (such as when a certain event happens).

A Springing Power of Attorney is most often used by business owners. If something unexpected happens to a business owner, they need to have someone else authorized to run the business. The person given this authority has springing power of attorney.

Most individuals do not need a Springing Power of Attorney. If you think you do, you should talk to a lawyer about your needs.

Why should I write a Power of Attorney?

There are many reasons to do a Power of Attorney such as:

- You are too ill to deal with your affairs and you need someone to take over control for you until you get better.
- You are not able to get around very well and you want to authorize someone to make deposits to and withdrawals from your bank account.
- You are travelling or working away from home and you want to give someone authority to deal with your affairs while you are away.
- You have an illness that will reduce your mental or physical mobility in the future, and you want to arrange now for that future need.
- You want to make arrangements now while you are well and competent, in case something unexpected takes place (such as an accident), that might limit your ability to deal with your affairs or to get around.

What can happen if I do not have an Enduring Power of Attorney?

If you do not have an Enduring Power of Attorney, and you become mentally incompetent and unable to take care of your affairs, a relative or friend may ask a court to appoint a guardian to handle your affairs. This might not be the person that you would have chosen to handle your affairs.

For more information, see the section *Guardianship of Adults*.

How much authority can I give in a Power of Attorney?

You can give your attorney two levels of responsibility:

- a) A **general power of attorney**: this gives your full authority to your attorney. There are no limits on what they can do on your behalf.
- b) A **specific power of attorney**: this says exactly what authority you give to your attorney. It limits what he or she can do on your behalf.

A specific power of attorney is most often used in a situation where you need someone to sell a piece of land for you or to deal with a particular bank account for you. It is important for a specific power of attorney to include all steps involved in the work you want done, so the attorney can complete the work.

What duty does my attorney have?

Your attorney has a duty to take good care in carrying out what you have authorized them to do. This duty includes:

- to stay within the authority you have given
- to use reasonable care and skill
- to act in your best interests
- not to profit personally from what is done for you

What are the risks of giving someone my power of attorney?

Power of attorney gives someone else power to act for you. Most people who are appointed under a Power of Attorney are honest. They try to do a good job and live up to their obligations.

There is a risk that the attorney could abuse that power because they:

- believe that they know what's best for you, even if you don't agree;
- or
- want to get money or property for themselves.

Banks and other financial institutions rely on the written Power of Attorney document. If you give your attorney power to withdraw cash from your bank accounts, to deal with your property, or to buy and sell investments on your behalf, the bank will not usually contact you to find out if you approve of what the attorney is doing.

What can I do to prevent misuse of a power of attorney?

Here are some things you can do to help prevent abuse of a power of attorney:

- Choose someone you can trust who will respect your wishes to be your attorney.
- Continue to pay attention to your affairs. Ask your attorney questions. Insist upon seeing regular statements. Do not give up all

control to that person.

- Ask your attorney to give you (or someone else if you become incompetent) regular updates on how they are managing your affairs.
- If you have a lot of savings, property, or investments, consider appointing a lawyer or a trust company to act on your behalf. Look carefully into the costs of this before you make a decision.
- Give a specific rather than a general power of attorney, unless your circumstances require that you give your full authority. For example, if you only need your attorney to deal with one bank account, then only give them power to do that.
- Check your bank statements and cancelled cheques carefully. You can put a limit on the amount that your attorney can withdraw from your accounts. If the attorney wants to withdraw more than that amount, then you would have to let your bank know that you agree.
- If you have investments, arrange for your investment dealer to keep you informed about all dealings. You can also arrange for them to inform a third person if you become incompetent.
- Make a list of your property, jewellery, savings, furnishings, and investments. Keep it up to date. Give a copy to the person named in your Power of Attorney and to at least one other person you trust.
- Tell your banks, financial institutions, and investment dealers to tell you of any transfers of funds and transactions over a certain limit.

▶ What are the legal requirements of an Ordinary Power of Attorney?

The legal requirements are:

Adult: In Nova Scotia, you must be aged 19 or older in order to:

- give a power of attorney.
- act as attorney under a Power of Attorney.

Capacity: You must be mentally **competent** to make a Power of Attorney. This is also called “having legal capacity.” You must be able to understand what it means to give a power of attorney.

Legal capacity is often an issue with people who have a mental infirmity or who are very ill. The mental capacity of someone who is very ill may be affected by the illness, drugs or pain. You should make

your Enduring Power of Attorney while you are in good health to avoid having your mental competence questioned.

The person who is named as an attorney under a Power of Attorney must understand what it is to receive a power of attorney.

Written: Your Power of Attorney must be in writing.

Signed: Your Power of Attorney must be signed by you.

The following are not legal requirements but they are a good idea:

- Put the date on the document.
- Initial and number each page so pages cannot be replaced or removed.
- Have your signature witnessed by someone who is a competent adult (not the attorney and not the attorney's spouse). Have that person sign their name on the document. The witness does not need to know what is stated in your Power of Attorney.
- Arrange for the witness to swear an **Affidavit of Execution**. (See the next question for more information.)

An Affidavit of Execution is a statement sworn by a witness in which the witness confirms that he or she saw you sign the Power of Attorney.

Although it is not a legal requirement to do an Affidavit of Execution for a Power of Attorney, it is common practice. If the Power of Attorney needs to be recorded at the Land Registration Office, you will need an Affidavit of Execution.

Affidavit of Execution is a combination of two legal terms. An **affidavit** is a statement that is sworn before a **Commissioner of Oaths** or a **Notary Public**.

The word **execution** is a legal term for the formal signing of a legal document before either a Commissioner of Oaths or a Notary Public.

All lawyers are Notary Publics and Commissioners for Oaths as well as lawyers. But you do not have to be a lawyer to be a Notary Public or Commissioners for Oaths. You can find Notary Publics and

Is there anything else I should include in an Ordinary Power of Attorney?

What is an Affidavit of Execution?

Commissioners for Oaths in the Yellow Pages.

For more information on recording your Power of Attorney at the Land Registration Office, see:

Can my attorney deal with land?

Does my Power of Attorney have to be recorded with the province of Nova Scotia?

Are there special requirements for an Enduring Power of Attorney?

Yes. In addition to the legal requirements for an Ordinary Power of Attorney, an Enduring Power of Attorney has two special requirements:

- It must be witnessed by someone who is competent and at least 19 years old who is not the attorney and who is not the attorney's spouse.
- It must state that it is to continue to be effective in the event of the legal incapacity of the donor.

These special requirements are set out in the Nova Scotia *Powers of Attorney Act*.

Does the person receiving the power of attorney have to sign the document?

No. But if they are to have access to any of your bank accounts, you will need to arrange to have them sign at the financial institutions where you have those accounts. Each bank, **trust company**, and credit union will need their signature. The institution will also have its own forms for you to complete.

Do I need a lawyer to write a Power of Attorney?

No. The law does not say that a lawyer must write your Power of Attorney. You can make up your Power of Attorney yourself. You can fill in a blank form that you can buy from a store or download from the internet. There are also books and kits available for Powers of Attorney.

It is wise to get legal advice from a lawyer about making a Power of Attorney, even if you do not want the lawyer to write it for you. A Power of Attorney is an important legal document and it must be worded carefully to make sure that it says what you want. In the unlikely event that a lawyer who draws up a Power of Attorney makes a mistake, there is insurance to cover the situation.

Among other things, a lawyer can:

- make sure the Power of Attorney is clear about the amount of authority you are giving to your attorney
- make sure that your Power of Attorney covers all the steps necessary for your attorney to do what you want done
- make sure the Power of Attorney meets all the legal requirements
- tell you about a number of standard **clauses** that can be included in a Power of Attorney to provide for unforeseen events
- tell you about options for wording the Power of Attorney
- tell you about things you can do now to make it easier for your attorney to deal with your affairs
- answer your questions about how your attorney might use the Power of Attorney to take care of your affairs
- help you understand the legal consequences of giving a Power of Attorney
- provide proof from their meetings with you that that you had legal capacity and that your Power of Attorney was made voluntarily, by your own free choice, and free of undue influence

If you decide to write your own Power of Attorney, you should have a lawyer look it over to make sure that it meets all the legal requirements and that it gives your attorney the authority you want to give.

It is very important to get advice from a lawyer if you want to have a specific or a Springing Power of Attorney to ensure that these documents are written to meet your individual needs.

What does it cost for a lawyer to do a Power of Attorney?

Lawyers charge a fee based upon the amount you want them to do. For example, you may want the lawyer to look at a Power of Attorney you have prepared or you may want them to prepare the Power of Attorney for you. The fee depends on how complex the work is. You should discuss fees with the lawyer before you decide to hire them.

Do I have to pay the person named in my Power of Attorney?

That depends on whether you have appointed a relative, friend, lawyer or trust company as your attorney.

A friend or relative is not entitled to any fee unless there is an agreement between the two of you for payment. In that case, you should include the terms of payment in the Power of Attorney document. Often a family member or a friend acts as an attorney without payment.

If a lawyer is acting under a power of attorney and is doing legal work for you, such as purchasing property or drawing up a will, they will charge a fee for doing this work.

A trust company will charge a fee for acting as your attorney. The fee is based on the value of your estate and your income.

No matter who you pick, your attorney is entitled to be compensated for any out-of-pocket expenses such as postage and parking.

▶ Can my attorney use my bank account?

Yes, if you include that authority in your Power of Attorney. Banks and other financial institutions generally need your attorney's signature for their files. Most have their own Power of Attorney forms which they will want you to sign. These forms can only be used to deal with that particular financial institution. They cannot be used to deal with other banks or financial institutions or to deal with your other general affairs. You should ask your bank or credit union if they have any special requirements.

Carefully read any form you are given before you sign it. It may limit an attorney's powers to deal with particular accounts or it may include power to deal with all accounts, investments, and safe deposit boxes held by you.

You can talk with the staff at the financial institution about your needs. If you do not understand all of the terms, you can ask them or ask a lawyer.

▶ Can my attorney do my taxes?

Yes, but usually only if you include a special clause in your Power of Attorney that permits them to deal directly with the Canada Revenue Agency on your behalf.

▶ Can my attorney deal with land?

Yes, if you give your attorney that authority in your Power of Attorney. If your Power of Attorney allows your attorney to deal with land, it must be recorded at the Land Registration Office in the district where the land is located before the land transaction can be completed. The Power of Attorney must be signed under seal and have an **Affidavit of Execution**.

There is a fee to record documents. Fees change from time to time. You should speak with staff at your local Land Registration Office to get information on current fees.

The phone number for your local office is listed in the blue Government pages of the phone book under "Land Registration." There is a toll free number that you can call: 1-866-518-4640. You can also get at www.gov.ns.ca/snsmr/offices.asp.

Can my attorney consent to medical treatment for me?

Yes, if you give them authority to do so. The Nova Scotia *Personal Directives Act* also lets you give a person authority to consent to medical treatment on your behalf if you become mentally or physically incapable of giving consent. The person you authorize to consent on your behalf is generally called your delegate. The consent can be included in your Enduring Power of Attorney document or it can be a separate document called a **personal directive**.

If you decide to include medical consent, your Power of Attorney must be in writing, signed by you, and witnessed. The witness cannot be the delegate or the delegate's spouse. Both you and your delegate must be at least 19 years of age and must be mentally competent.

For more information, see the section *Health Care Treatment and Consent*.

Where should I keep my Power of Attorney?

You should put your Power of Attorney document in a safe place. A fire-proof location is the best place.

If you want your attorney to start using the power immediately, you should give it to them. Keep a copy for yourself in a safe place. You should give a copy to any financial institutions and to any other parties that your attorney will be dealing with on your behalf. Keep a list of the businesses and people to whom you give a copy of your Power of Attorney, in case you have to tell them of any changes.

If you have a Power of Attorney that may not be used for awhile, perhaps never:

- Put it in a safe place that your attorney knows about, which they can access quickly, if necessary.
- Leave it with a trusted third party, such as a lawyer, and give clear instructions about when to release it.
- Give it to your attorney to keep in a safe place until it is needed.

Do not put your Power of Attorney in a safe deposit box that is in your name only, as your attorney may not be able to get access to it.

It may be many years before your Power of Attorney is needed, if it is ever necessary. Meanwhile, the person storing your document may move away or die.

As time passes, keep track of where your Power of Attorney is being kept. Make sure you tell your attorney where the document is stored so that they can find it if it is needed. You should make sure that the people in your life who need to know about your Power of Attorney also know where to get it when it is needed.

▶ How does a power of attorney end?

You can end a power of attorney at any time and should do so if your attorney is abusing the power you have given them.

Notice by the donor: You may cancel a power of attorney by giving notice to the attorney. The notice must be in writing, dated, and signed by you.

If you cancel your power of attorney:

- write to all the people and businesses who dealt with the attorney on your behalf to tell them that the power of attorney has been cancelled. Keep a copy of the letters.
- ask everyone who has a copy of the document to return it to you. Banks and some other organizations may need to keep a copy of the document for their files.
- contact the Land Registration Office if the Power of Attorney is registered there so you can find out what needs to be done to put notice of your cancellation on the record. You do not need to do this if the power of attorney has already ended because it was for a specific time period or for a task that has been completed.

You should give written notice when a power of attorney is cancelled or when an attorney's authority is ended. Any person or business that deals in good faith with the attorney can rely on the Power of Attorney if it does not know that the document has been cancelled.

Notice by the attorney: Your attorney can give you notice that they no longer want to act as your attorney. If that happens, you should write to all the people and businesses who dealt with the attorney on your behalf, to tell them that the attorney no longer has your authority. Keep a copy of the letters. Ask your attorney to return the Power of Attorney to you.

You should always name a back-up attorney in your Power of Attorney in case your first choice is not able to act for any reason. If you do this, your back-up attorney takes over authority to act on your behalf and your Power of Attorney document remains effective. If you have not named a back-up attorney, your Power of Attorney document will have no legal effect after your attorney has given you notice that they no longer want to act for you.

Mental incompetence: If you become mentally incompetent, your Power of Attorney is automatically cancelled unless it is an Enduring Power of Attorney.

If your attorney becomes mentally incompetent and you have not named a back-up attorney, your Power of Attorney is automatically cancelled. This is the case whether it is an ordinary or an Enduring Power of Attorney.

In some situations, when the **public trustee** is acting for a person who becomes mentally incompetent, the public trustee will continue to act on behalf of that person. (For more information, see the section *Public Trustee*.)

Death: When you die, your power of attorney is cancelled.

If your attorney dies and you have not named a back-up attorney, your power of attorney is cancelled.

If the public trustee is acting on behalf of a person who dies, they will continue to act until a court appoints someone to administer the estate if the person did not leave a will naming an executor. (For more information, see the section *Public Trustee*.)

Bankruptcy: If you become bankrupt, a **Trustee in Bankruptcy** takes over all your financial affairs and your power of attorney is cancelled. They administer the affairs of a bankrupt person.

If your attorney becomes bankrupt, your power of attorney is not automatically cancelled. It is only cancelled if the bankruptcy makes your attorney unfit to carry out their duties.

If bankruptcy makes your attorney unfit to carry out their duties, your back-up attorney, if you named one, would take over authority to act on your behalf and your Power of Attorney document would remain effective.

Time: A Power of Attorney document can be for a specific time or task. When the time or task is complete, the power of attorney ends.

For example, you might give someone a specific power of attorney to complete the sale of a house. The attorney's authority under that document would end when the sale of the house is completed.

In another example, you might give a general power of attorney while you are away on vacation. The attorney's authority under that document would end when you return home.

▶ Can the person I choose as my attorney decide not to act?

Yes. Before you write your Power of Attorney, you should ask the person you want as your attorney if they are willing to take on the job. If they refuse, you can appoint someone else. You should also ask a back-up attorney.

If you do not name a back-up attorney, your attorney will automatically be cancelled if your attorney gives you notice that they no longer want to act as your attorney.

▶ Is a Power of Attorney made outside of Nova Scotia valid here?

The legal requirements of powers of attorney are provincial. Your Power of Attorney may be valid if it was made outside Nova Scotia. To find out for sure, you should have it checked by a Nova Scotia lawyer to see if it meets the requirements of the law here.

▶ Is my Power of Attorney valid outside of Nova Scotia?

If your attorney may need to use the power of attorney outside of Nova Scotia, you should check with a lawyer to see whether you should draw up a separate Power of Attorney for that province or country. For example, if you and your spouse spend the winter in Florida and you have given each other power of attorney, it would be wise to get legal advice as to whether your Powers of Attorney meet the laws of Florida.

▶ Does my Power of Attorney have to be recorded with the province of Nova Scotia?

No. A Power of Attorney only has to be recorded when it gives authority to deal with land. Then it must be recorded at the Land Registration Office where the land is located.

What can I do if my attorney misuses my power of attorney?

There are a number of things you can do, depending on your situation and on your relationship with your attorney:

- At the very least, talk over your concerns with a lawyer or someone else you trust.
- Ask your attorney to account for how they have managed your affairs.
- You can cancel their authority under your Power of Attorney and use your back-up attorney. If you did not name a back-up attorney, you could cancel the Power of Attorney.
- It is a criminal offence to misuse a power of attorney. If your attorney is using your property or money for their own benefit without your consent, you should talk with a lawyer and the police.
- If you have an Enduring Power of Attorney and later become **incompetent**, your attorney can be required to account for how they have managed your property. The application would be made to the Supreme Court of Nova Scotia by someone who believed that your attorney was abusing their power. The court could order the attorney to account to the public trustee. The court can also remove the attorney and appoint someone else to manage your affairs.
- An attorney can voluntarily give an accounting to the Public Trustee Office.

Under the *Adult Protection Act*, if an attorney or guardian is neglecting the adult's property or dealing with it in a way that is not in their best interests, or if an adult is in need of protection, a judge may inform the public trustee. (For more information, see the section *Public Trustee*.)

Where can I find more information on Powers of Attorney?

Legal Information Society of Nova Scotia (LISNS)
Legal Information Line
902.455.3135
1.800.665.9779

LISNS also has online information at www.legalinfo.org.
Under "Legal Information,"
go to "Planning your Life."
Click "Power of Attorney."