

2011 POWER OF ATTORNEY CHANGES

As of September 1, 2011, there are important changes to the law regarding Enduring Powers of Attorney in British Columbia. The Power of Attorney Act has been significantly amended. Some of the changes are highlighted below:

The old enduring provision of the Act allowing a power of attorney to continue to have legal effect after the maker became incapable, has been repealed. In its place are a number of new sections codifying much of the common law in this area. However non-enduring powers of attorney (for example, your typical commercial power of attorney for an investment account) are unchanged. As well, any enduring powers of attorney validly made in B.C. prior to September 1, 2011 are grandfathered and continue to have effect.

There is a new, higher test for capacity to make an enduring power of attorney, including a requirement that the maker of the power of attorney have an understanding of the nature and value of the maker's assets.

Enduring powers of attorney that are triggered by a specified event (usually incapacity of the maker) are now expressly allowed. Care must be taken when drafting such a document so that it is clear when it comes into effect.

Alternate attorneys can now be named, but again care must be taken when drafting an enduring power of attorney that includes an alternate attorney so that it is clear when the alternate attorney's authority starts.

One of the biggest changes is that the attorney must now sign the enduring power of attorney document before it comes into effect. Both the maker's and the attorney's signatures must be witnessed by two witnesses - or only one witness, if the witness is a lawyer or notary public. There are specified restrictions on who cannot act as a witness.

The duties of an attorney are now codified in the Act. Such duties as to act in the maker's best interest, to keep the assets separate from the attorney's assets and to keep records and accounts, are specified.

There are a number of new options that can be included in an enduring power of attorney document. There is now a power to make gifts or loans in limited circumstances. An attorney still cannot make a Will, but there can be a restricted power to designate beneficiaries in plans. Delegation can be specified. Investment powers beyond the Trustee Act can be set out in the instrument.

Compensation for the attorney must be expressly included in the document, along with the rate or amount of the attorney's fee. The attorney is still entitled to be reimbursed for expenses without the need to include this in the document.

The Act specifies when the enduring power of attorney terminates or is suspended. If the maker wants to revoke the enduring power of attorney, notice must be given.

Our firm has been actively involved in the law reform in this area and we have extensive experience with powers of attorney and other planning documents. Please contact us if we can assist.

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