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THE ENDURING POWER OF ATTORNEY A GUIDE

The purpose of this Guide is to outline the nature and effect of an Enduring Power of Attorney and to assist clients of Walsh LLP in their decisions whether or not to grant an Enduring Power of Attorney, and if a decision is made to grant the Enduring Power of Attorney, then the provisions that should be contained in the Enduring Power of Attorney. For the purposes of this Guide, the person who grants the Enduring Power of Attorney will be called the "Donor", the person named in the Enduring Power of Attorney to act on behalf of the Donor will be called the "Attorney", and the Enduring Power of Attorney will be called the "EPA".

A Power of Attorney is a written document whereby the Donor appoints an Attorney to act on behalf of the Donor in relation to financial matters of the Donor. The Power of Attorney can be limited either in respect of the powers of the Attorney or the assets of the Donor, or both, or can be of general application over all of the financial matters and assets of the Donor and be unlimited in its powers. The difference between a normal Power of Attorney and an EPA is that the EPA will continue in effect even though the Donor may at a later time become mentally incapacitated and lose the ability to be able to cancel or revoke the EPA.

Until EPA's were recognized in law in Alberta, the only legal means whereby a person could act on behalf of another person who was unable to manage his or her financial affairs was for that person to be appointed Trustee under the *Adult Guardianship and Trusteeship Act* of Alberta. The procedure under the *Adult Guardianship and Trusteeship Act* is not only costly but can also present inconvenience to a Represented Adult's family and can be regarded as an intrusion upon their lives. The EPA allows us to plan for our incapacity (similar to the planning that is afforded to us in planning for the administration of our Estate upon our death) and affords a relatively inexpensive alternative to the procedure under the *Adult Guardianship and Trusteeship Act*.

The decision to grant an EPA should not be taken lightly and should be taken only after consultation with all concerned. It should be remembered that the EPA relates only to the financial affairs of the Donor.

To assist you in your planning, you will find attached to this Guide our Preliminary Notes to Donors as well as a Confidential Questionnaire.

You will note that an Inventory of Assets and Liabilities forms part of the Confidential Questionnaire. You should complete this Inventory in order that we can ensure that the EPA will be consistent with your overall Estate Plan.

If you choose to proceed with the preparation of an EPA, please review the Preliminary Notes to Donors and complete and return the Confidential Questionnaire to these offices. We will then be in a position to advise you and assist you in the completion of an EPA.

Warmest personal regards,

WALSH LLP

PRELIMINARY NOTES TO DONORS RE: ENDURING POWERS OF ATTORNEY

1. FIDUCIARY DUTY OF ATTORNEY

As a general principle, restrictions on an Attorney's authority arise out of the fiduciary duty owed by an agent (Attorney) to his principal (Donor). These restrictions are imposed at law to prevent the Attorney from abusing the duties owed to the Donor, and eventually to the Personal Representatives of a deceased Donor's Estate.

The fiduciary duty owed by an agent (Attorney) to his principal (Donor) is one of utmost good faith which requires that the Donor's instructions as contained in the Enduring Power of Attorney be followed. This duty extends to prohibiting any action where it would conflict with the best interests of the Donor. Such prohibition includes the use of an opportunity, information or the property of the Donor in a manner inconsistent with the duty of utmost good faith owed by the Attorney.

2. REVOCATION OR TERMINATION OF POWER OF ATTORNEY

The essential nature of an Enduring Power of Attorney is that it will remain in force and effect even if the Donor suffers from mental incapacity after having granted the Enduring Power of Attorney.

Just as the Donor has the power to grant a Power of Attorney while mentally competent, the Donor has the ability to revoke the Power of Attorney at any time while mentally competent to do so.

If the Donor becomes mentally incompetent and by reason thereof is unable to revoke the Enduring Power of Attorney, the Enduring Power of Attorney and the Attorney's authority to act will continue until or unless terminated in any of the following circumstances:

- (a) If, upon the application to the Court of an interested person, the Court were to remove the Attorney;
- (b) Upon the Court appointing a Trustee to act as Trustee of the Estate of the Donor under the *Adult Guardianship and Trusteeship Act* of Alberta;
- (c) Upon a Trustee being appointed to act as Trustee of the Estate of the Attorney under the *Adult Guardianship and Trusteeship Act* of Alberta;
- (d) Upon the obtaining of Court approval in the case where the Attorney has accepted the appointment and commences to act, but later wishes to resign;
- (e) Upon the death of the Attorney or the death of the last remaining Attorney; or
- (f) Upon the death of the Donor (in which case only the Personal Representatives of the Donor have the authority to deal with the Estate of the deceased Donor).

3. DUTY AND AUTHORITY TO ACT

At such time as the Enduring Power of Attorney becomes operative whether by the delivery of the Enduring Power of Attorney to the Attorney and/or the happening of the contingent event upon which the Attorney's authority becomes operative, then once the Attorney has commenced to act or has otherwise indicated acceptance of the appointment as Attorney, certain duties and responsibilities will arise.

The Attorney must exercise the powers granted by the Enduring Power of Attorney with reasonable care and diligence to protect the interests of the Donor during any period in which the Attorney knows, or reasonably ought to know, that the Donor is unable to make reasonable judgments in respect of matters relating to all or part of the Donor's Estate. Attorneys also have a duty of loyalty and utmost good faith which is similar to the duty and responsibility of a trustee.

The Enduring Power of Attorney should be carefully considered with respect to the powers granted by the Enduring Power of Attorney or the manner in which those powers are to be exercised, and particularly with respect to any restrictions imposed by the Donor on the powers of the Attorney.

The Enduring Power of Attorney may provide for the appointment of an Alternate Attorney if the Primary Attorney dies before the Enduring Power of Attorney becomes effective (that is, before the contingency happens), refuses to act or to continue to act, resigns, or is unable to act or to continue to act as Attorney.

When two or more Attorneys are appointed, it is presumed to be given to them jointly, unless a contrary intention is shown in the Enduring Power of Attorney. All the joint Attorneys must concur in the execution of the joint authority, unless the contrary is shown in the Enduring Power of Attorney (for example, by a majority vote clause).

When the Enduring Power of Attorney appoints two or more Attorneys severally, or jointly and severally, any one of them may act without the concurrence of the others.

As a general principle, unless the Enduring Power of Attorney provides otherwise, each Attorney will be liable for the acts, errors, and omissions of each of the other Attorneys where reasonable care and diligence has not been taken by the Attorney so affected.

The Enduring Power of Attorney may provide that the Attorney's powers of investment will be in accordance with the "Prudent Investor Rule" under the *Trustee Act*, and, in that case, the Attorney should familiarize himself or herself with Sections 1 - 8 of the *Trustee Act*, R.S.A. 2000, c. T-8, and any regulations thereunder, as amended, a copy of which is attached hereto. The Enduring Power of Attorney may alternatively provide that the Attorney's powers of investment will be restricted to certain specific types of investments as may be so detailed in the Enduring Power of Attorney. As a further alternative, the Enduring Power of Attorney may provide that the Attorney's powers of investment are unrestricted.

In the case of the Donor's incapacity, the Attorney is also responsible for ensuring that the usual income tax returns are filed on a timely basis, and penalties for any late filings may be charged to the Attorney personally.

4. ACCOUNTING

An Attorney must keep his or her own property separate from that of the Donor's, and must keep accurate accounts of all transactions entered into on the Donor's behalf. The Attorney is obligated to provide a copy of his or her Accounting of all monies and assets received and disbursed on behalf of the Donor to the Donor upon request. If the Donor lacks the mental capacity either to make an informed decision whether to request the Accounts, to understand them, or to revoke the Enduring Power of Attorney if the Accounts indicate mismanagement, the Court has the power to direct the Attorney to bring in and pass Accounts upon the Application by the Donor, the Donor's Personal Representative or a Trustee of the Donor's Estate, or, if the Donor is unable to make reasonable judgments in respect of matters relating to all or part of the Donor's Estate, by any interested person.

We recommend that the Attorney consider providing the competent Donor with a regular accounting of all transactions entered into on the Donor's behalf and obtain approval of his or her accounting from time to time from the Donor. We recommend that the Donor acknowledge receipt of the Accounting in writing and provide the Attorney with a Release in respect of each accounting period.

5. ATTORNEY'S REMUNERATION

As a general principle, unless the Power of Attorney provides to the contrary, an Attorney is entitled to receive reasonable remuneration in providing the services to or on behalf of the Donor. However, to avoid confusion, the Enduring Power of Attorney should address the matter of the Attorney's compensation.

The Enduring Power of Attorney may specifically provide that remuneration be paid to the Attorney, and in that case the Attorney is only entitled to receive the amount of remuneration stated in the Enduring Power of Attorney at the times stated.

The Enduring Power of Attorney may state that remuneration is to be determined in accordance with the provisions of the *Trustee Act* of Alberta, and, in that event, if the Donor is mentally incapacitated, the Attorney must seek approval for his proposed fee from the Court in accordance with the provisions of the *Trustee Act* of Alberta. In that case, the Attorney is not permitted to pre-take compensation, but must wait for the direction of the Court in that regard.

The Attorney has the right to refuse to receive any remuneration for so acting at any given time.

Any remuneration received by an Attorney is considered to be taxable income from an office or employment and must be reported by that Attorney in his or her Income Tax Return for the year in which such remuneration is actually paid to him or her.

6. JURISDICTION

Depending upon that jurisdiction's laws, we wish to note that jurisdictions outside Alberta may or may not accept the Enduring Power of Attorney executed in Alberta. If the Enduring Power of Attorney is intended to be used outside Alberta, you should consult with a lawyer in that other jurisdiction to determine whether they will recognize the foreign Enduring Power of Attorney. If a similar Enduring Power of Attorney is to be executed in another jurisdiction, care should be taken not to revoke the Alberta Enduring Power of Attorney unless the Donor specifically

requests it be revoked or unless the Donor ceases to maintain his or her residence or any property or assets in Alberta.

WARNING TO READER

**THE FOREGOING NOTES ARE ONLY
INTENDED TO BE A GENERAL STATEMENT
OF BROAD PRINCIPLES OF LAW RELATING
TO ENDURING POWERS OF ATTORNEY AND
ARE NOT INTENDED TO HAVE SPECIFIC
APPLICATION IN ALL INSTANCES.**