

Power of Attorney — important for the living

By Kathryn E. Burns, LL.B.

Most of us are aware of the importance of having a Will. Few of us, however, appreciate the importance of having a Power of Attorney until it is too late.

While a Will provides the management of our affairs and disposition of our property after death, a Power of Attorney is our insurance that during our lifetime someone whom we know and trust will be able to manage our affairs for us if we, for whatever reason, cannot. The fact is that few of us are fortunate enough to get through life healthy and in full possession of our faculties until the end. At a minimum, we need a Power of Attorney as protection against the misfortunes of accident, illness or senility.

What is a Power of Attorney?

A Power of Attorney is a document whereby one person (the Principal) authorizes another person (the Attorney) to act on her behalf. The actions and signature of the Attorney, acting in her capacity as such, are legally binding on the Principal.

To grant a Power of Attorney, the Principal must be at least 18 years of age and mentally competent. Needless to say, the Attorney must also be mentally competent to exercise the Power of Attorney.

You may appoint one or more people as your Attorney. If you appoint two people "Jointly" as your Attorney, it means both of them must sign any documents on your behalf to be effective. If you appoint two or more people "Severally", it means any one of them can exercise the Power of Attorney as required from time to time.

Just as it is prudent to name an alternate Executor in your Will in the event your original Executor dies or becomes incapable of completing the administration of your estate, it is wise, particularly if you are elderly and the Attorney is your spouse, to appoint an alternate Attorney while you still have the mental capacity to do so.

Fiduciary Relationship

A fiduciary relationship exists between the Principal and her Attorney. The Attorney holds a position of trust, and has a legal obligation to use reasonable care, act only in the best interests of the Principal, account for her actions, and not profit from her position. In addition, while an Executor is entitled to be paid for the administration of an estate, at law an Attorney is not entitled to any compensation for managing the affairs of a mentally incompetent person.

In reality, however, your protection that the Power of Attorney will not be abused rests on your choice of an Attorney.

needs, circumstances and wishes. The document is signed by the Principal and witnessed by another person who must not be either the Attorney nor the Attorney's spouse. Contrary to popular misconception, the signature of the Attorney is not required at the time the Power of Attorney is made.

The authority given may be virtually unlimited or it may be restricted to specific matters (such as the sale of a particular piece of real estate) or to a period of time (such as an absence for vacation or business).

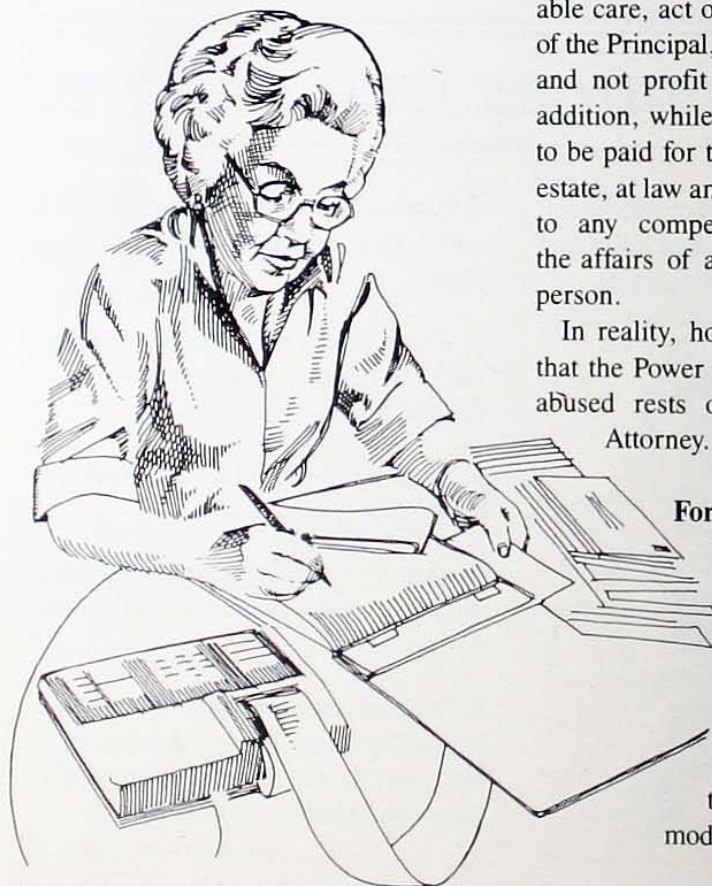
The form also contains two optional clauses which are the main reasons why people have a Power of Attorney. The first clause provides that the Power of Attorney may be exercised during any subsequent mental incapacity of the Principal, and the second clause enables the Attorney to continue to act in the place of the Public Trustee should the Principal be certified mentally incompetent and become a patient of a "psychiatric facility". The definition of "psychiatric facility" in the Mental Health Act includes not only a mental hospital or psychiatric institution but also the psychiatric ward of a general hospital.

Most banks and trust companies have their own Power of Attorney forms for the operation of bank accounts. If you only wish to ensure that someone else will be able to handle your banking and pay your bills, you may use your bank's Power of Attorney form. You should not, as many people do, open a joint account for this purpose, unless you intend the other person to have all the money in the account on your death.

Outside Ontario

A Power of Attorney recognized in Ontario may not be legally effective in another jurisdiction. If you have assets outside the province, particularly real estate, you should ascertain what the requirements of that particular jurisdiction are for a Power of Attorney.

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Form

In Ontario, Powers of Attorney are governed by the common law and the Powers of Attorney Act. The act provides for a general form of Power of Attorney which can be modified as required by your