

Chapter 9

POWERS OF ATTORNEY ACT

(Assented to May 5, 2005)

The Commissioner of Nunavut, by and with the advice and consent of the Legislative Assembly, enacts as follows:

INTERPRETATION

Definitions

1. In this Act,

"attorney" means a person authorized to act for a donor under a power of attorney;
(*mandataire*)

"Court" means the Nunavut Court of Justice; (*Cour*)

"declaration" means a declaration referred to in section 3 or 4; (*déclaration*)

"donor" means an individual who gives a power of attorney; (*mandant*)

"enduring power of attorney" means a power of attorney described in section 8;
(*procuration durable*)

"mental incapacity", unless otherwise specified in a power of attorney, means the inability of a person, due to infirmity or impaired judgment, whether arising from disease, disability, age, addiction or other cause

- (a) to understand information that is relevant to making a decision concerning his or her property or financial interests, or
- (b) to appreciate the reasonably foreseeable consequences of a decision concerning his or her property or financial interests or the lack of such a decision; (*incapacité mentale*)

"power of attorney" means a power of attorney described in subsection 2(1), and includes an enduring power of attorney and a springing power of attorney; (*procuration*)

"Public Trustee" means the Public Trustee appointed under the *Public Trustee Act*;
(*curateur public*)

"spouse" means an individual

- (a) to whom a donor or attorney is married, or
- (b) with whom a donor or attorney is living in a conjugal relationship outside marriage, if the individual and the donor or attorney
 - (i) have cohabited for at least one year, or
 - (ii) are together the parents of a child; (*conjoint*)

"springing power of attorney" means a power of attorney described in subsection 3(1).
(*procuration subordonnée à une condition suspensive*)

APPLICATION

Application

- 2.** (1) Despite any agreement or waiver to the contrary, this Act and the regulations apply to a power of attorney
- (a) given by a donor with respect to the donor's property and financial interests; and
 - (b) executed before or after this Act comes into force, except as provided in this section.

Sections do not apply

(2) Sections 11 and 12 do not apply to a power of attorney executed before the coming into force of this Act.

SPRINGING AND ENDURING POWERS OF ATTORNEY

Springing Power of Attorney

Springing power of attorney

- 3.** (1) A donor may provide in a power of attorney that it comes into force at a specified future date or on the occurrence of a specified contingency.

Coming into force

(2) A springing power of attorney is not in force unless the written declarations required by subsections (3) or (4) or a judicial declaration under section 4 have been obtained.

Declaration by named persons

- (3) In a springing power of attorney
- (a) the donor may name one or more persons to provide a written declaration that the date or contingency specified in the springing power of attorney has occurred; and
 - (b) the donor may name the attorney as a declarant.

Declaration by prescribed professionals

- (4) The attorney may request from two members of a prescribed professional group, a written declaration that the date or contingency specified in the springing power of attorney has occurred, where
- (a) the springing power of attorney comes into force on the physical or mental incapacity of the donor; and
 - (b) the donor does not name a declarant under subsection (3) or a named declarant is unable or unwilling to provide a declaration.

Application for judicial declaration

- 4.** (1) On application by originating notice, the Court may determine whether the date or contingency specified in a springing power of attorney has occurred
- (a) if the donor did not name a declarant under subsection 3(3), or a named declarant is unable or unwilling to provide a declaration; or
 - (b) in any other circumstances that the Court considers appropriate.

Who may apply

(2) An application may be made by the attorney, the Public Trustee, a declarant named under subsection 3(3) or, in the discretion of the Court, any other person.

Notice

- (3) An applicant shall give notice of the application to
- (a) the donor, unless the Court orders otherwise;
 - (b) the attorney;
 - (c) a declarant named in the power of attorney;
 - (d) the Public Trustee; and
 - (e) any other person, as the Court may order.

Powers of Court

- (4) On application made under this section, the Court may,
- (a) having regard to the power of attorney and the donor's intentions, issue a judicial declaration that the date or contingency specified in a springing power of attorney has or has not occurred;
 - (b) order that the costs of the application be paid by the applicant, the estate of the donor, by a person not party to the proceeding, or in case of hardship by the Government of Nunavut.

Disclosure of confidential information

5. (1) Where a power of attorney comes into force on the physical or mental incapacity of the donor, information respecting the donor's health shall be disclosed on request to a declarant described in subsection 3(3), a member of a prescribed professional group described under subsection 3(4), or the Court to the extent necessary to determine whether the date or contingency specified in a springing power of attorney has occurred.

Liability

(2) A person who gives health information under subsection (1) is not liable for having given, analysed or interpreted a donor's personal health information, if he or she has acted in good faith, consistent with all applicable professional standards of care.

Paramountcy

(3) Where there is an inconsistency or conflict between this section, and the *Access to Information and Protection of Privacy Act*, this section prevails to the extent of the inconsistency or conflict.

Effect of declaration

6. Where a third party relies in good faith on a declaration as evidence of the authority of an attorney, the declaration is conclusive proof in respect of that third party that the specified date or contingency has occurred.

Liability of attorney

7. (1) Where an attorney appointed under a springing power of attorney mistakenly but reasonably believes in good faith that the date or contingency specified in the power of attorney has or has not occurred, the attorney is not for that reason alone liable for acting or failing to act under the power of attorney.

Duty to act

(2) An attorney appointed under a springing power of attorney who knows or ought reasonably to know that the power of attorney has come into force, is under a duty to act on behalf of the donor if

- (a) the attorney has at any time indicated acceptance of the appointment as attorney; and
- (b) the attorney's authority under the power of attorney has not been terminated or found to be invalid by the Court.

Enduring Power of Attorney

Enduring power of attorney

8. A donor may provide in a power of attorney that it is to continue despite any mental incapacity of the donor that occurs after the execution of the power of attorney.

Duty to act

9. An attorney appointed under an enduring power of attorney who knows or ought reasonably to know that the donor is mentally incapacitated, is under a duty to act on behalf of the donor during that mental incapacity if

- (a) the attorney has at any time acted under the power of attorney or otherwise indicated acceptance of the appointment as attorney; and
- (b) the attorney's authority under the power of attorney has not been terminated or found to be invalid by the Court.

GENERAL

Formal requirements

10. (1) A power of attorney is valid as a springing or enduring power of attorney if the donor has attained the age of 19 years at the time he or she executes the power of attorney and the power of attorney

- (a) is in writing;
- (b) is dated;
- (c) is signed in the presence of a witness by the donor, or by another individual and acknowledged by the donor in accordance with subsection (2);

- (d) is signed by the witness in the presence of the donor; and
- (e) provides, as the case may be,
 - (i) that it is to come into force at a specified future date or on the occurrence of a specified contingency, or
 - (ii) that it is to continue in force despite any mental incapacity of the donor that occurs after its execution.

If donor cannot read or write

(2) Where a donor is incapable of reading or signing a springing or enduring power of attorney, an individual other than the attorney or the attorney's spouse may sign the power of attorney on the donor's behalf in the presence and at the direction of the donor, in which case

- (a) the donor shall acknowledge the signature in the presence of a witness; and
- (b) the witness shall sign the springing or enduring power of attorney in the presence of the donor.

Capacity of donor

(3) A springing or enduring power of attorney may not be validly given by a donor if, at the time the power of attorney is executed, the donor is unable to understand the nature and effect of the document in general or of the following related matters in particular:

- (a) the nature of the donor's property that will be subject to the power of attorney and its approximate value;
- (b) the donor's obligations to his or her dependants;
- (c) that the attorney will, under and subject to the power of attorney, be able to do on the donor's behalf anything in respect of the donor's property that the donor could do, except make or amend a will;
- (d) that the attorney must account for his or her dealings with the donor's property;
- (e) that the power of attorney may be subsequently revoked by the donor, if he or she has the capacity required in this subsection;
- (f) that the property that will be subject to the power of attorney may decline in value unless the property is prudently managed by the attorney;
- (g) the possibility that the attorney may misuse the authority given to him or her under the power of attorney.

Affidavit of witness

(4) For greater certainty, subsection 29(2) of the *Land Titles Act* applies to the witness to the execution of a power of attorney if the donor or the attorney wishes to file the power of attorney in a land titles office.

Persons ineligible to witness

11. The attorney appointed under a power of attorney and his or her spouse may not act as a witness to the donor's signature.

Mandatory forms and information

12. (1) A power of attorney, declaration, revocation or renunciation to which this Act applies that is to be filed in the land titles office must

- (a) be in the prescribed form; and
- (b) include the prescribed information.

Other forms and information

(2) Except where subsection (1) applies, a power of attorney, declaration, revocation, renunciation or accounting to which this Act applies may

- (a) be in the prescribed form; and
- (b) include the prescribed information.

Deviation

(3) Deviation from a prescribed form or a lack of prescribed information not affecting the substance or calculated to mislead, does not alone invalidate a power of attorney, declaration, revocation, renunciation or accounting.

General powers of attorney

13. (1) A springing or enduring power of attorney shall not be construed as being limited by or to any specific powers that are expressly included in the power of attorney if the power of attorney

- (a) purports to be a general power of attorney; or
- (b) grants a scope of authority similar to that which a trustee has under paragraph 16(1)(a).

Authority of attorney

(2) Subject to this Act and the provisions of a springing or enduring power of attorney, an attorney

- (a) has the authority to do anything on behalf of the donor that the donor may lawfully do by an attorney, including the authority to transfer to himself or herself any property subject to the power of attorney;
- (b) may exercise the attorney's authority for the maintenance, education, benefit and advancement of the donor's spouse and dependent children, including the attorney if he or she is the donor's spouse or dependent child; and
- (c) may exercise the power to dispose of the donor's property in order to satisfy a legal obligation of the donor, including the legal obligation to maintain and support another person or the attorney.

Application to springing powers of attorney

(3) Subsection (2) applies, in respect of a springing power of attorney, only to a power of attorney that comes into force on the mental incapacity of the donor.

Restriction

(4) An attorney may not make or amend a will on behalf of a donor.

Delegation

(5) Except as expressly authorized by a springing or enduring power of attorney, an attorney may not delegate any of his or her powers or duties as an attorney.

Application to after-acquired property

(6) Unless a springing or enduring power of attorney provides otherwise, the same rights and powers that are conferred on an attorney in respect of property owned by the donor at the time the donor executes the power of attorney apply to property acquired by the donor after that time.

Filing with the Public Trustee

14. (1) A donor or attorney may file with the Public Trustee, an original or certified copy of

- (a) a springing or enduring power of attorney; and
- (b) a declaration, revocation, renunciation or accounting relating to a power of attorney that has been filed.

Register

(2) The Public Trustee shall establish and maintain a register, and shall provide access and certified copies of documents filed under subsection (1) as provided in this section and the regulations.

Personal information

(3) Documents filed in the register pursuant to subsection (1) are personal information and no person shall have access to them, except as provided in this section and the regulations.

Access by donor or attorney

(4) A donor and an attorney named in a springing or enduring power of attorney may examine and obtain certified copies of documents filed by or on behalf of the donor pursuant to subsection (1).

Access on consent

(5) A person who provides the Public Trustee with the written consent of the attorney named in a springing or enduring power of attorney, or of a donor who meets the requirements of subsection 10(3), may examine and obtain certified copies of documents filed by or on behalf of the donor pursuant to subsection (1).

Court ordered access

(6) The Public Trustee shall comply with a lawful subpoena, warrant or order for the disclosure or production of documents filed by or on behalf of a donor pursuant to subsection (1).

Paramountcy

(7) Where there is an inconsistency or conflict between this section, and the *Access to Information and Protection of Privacy Act*, this section prevails to the extent of the inconsistency or conflict.

Definition of "purchaser"

15. (1) In this section, "purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee and any other person who, for valuable consideration, acquires an interest in property or a lien or charge on property.

Irrevocable power of attorney for value

(2) Where a power of attorney is given for valuable consideration and is expressed in the document creating the power to be irrevocable, then, in respect of a purchaser,

- (a) the donor may not terminate the power of attorney without the agreement of the attorney, and the power of attorney is not terminated by the death, mental incapacity or bankruptcy of the donor; and
- (b) the attorney and the purchaser are not affected by an act done by the donor to terminate the power of attorney without the agreement of the attorney, or by the death, mental incapacity or bankruptcy of the donor.

Termination

16. (1) Subject to subsection 15(2), the authority of an attorney under a springing or enduring power of attorney terminates on the revocation of the power of attorney by the donor, or on the occurrence of any one of the following events or circumstances:

- (a) the issuance of a trusteeship order or a declaration of mental incompetence under section 31 of the *Guardianship and Trusteeship Act* in respect of the donor;
- (b) the donor's bankruptcy, unless the power of attorney provides otherwise;
- (c) the attorney's bankruptcy, mental incapacity or death;
- (d) the donor's death;
- (e) subject to section 24, the attorney's giving of notice to the donor that he or she has renounced his or her appointment as attorney;
- (f) the termination of the power of attorney by the Court.

Revocation

(2) Subject to subsection 15(2), a donor who meets the capacity requirements described in subsection 10(3) may revoke a springing or enduring power of attorney by executing a revocation pursuant to section 12.

Action after authority terminates

17. (1) Where the authority of an attorney under a power of attorney is terminated or is found by the Court to be invalid, any subsequent action taken under the power of attorney by the attorney is valid and binding in favour of any person, including the attorney, who did not know, and had no reasonable grounds to believe, that the authority had been terminated or found to be invalid.

Liability of attorney

(2) Where the authority of an attorney under a power of attorney is terminated or is found by the Court to be invalid, the attorney is not liable to the donor or the estate of the donor for subsequently acting under the power of attorney if the attorney did not know, and had no reasonable grounds to believe, that the authority had been terminated or found to be invalid.

Duties of attorney

18. An attorney under a springing or enduring power of attorney shall exercise his or her authority

- (a) honestly,
- (b) in good faith,
- (c) in the best interests of the donor, and
- (d) in accordance with this Act and the regulations.

Standard of care if attorney not compensated

19. (1) An attorney who does not receive compensation for acting as an attorney shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in the conduct of his or her own affairs.

Standard of care if attorney compensated

(2) An attorney who receives compensation for acting as an attorney shall exercise the judgment and care that a person of prudence, discretion and intelligence in the business of managing the property or financial interests of others is required to exercise.

Liability of attorney for failure to act

20. An attorney who fails to act as required by this Act is liable to the donor for any loss occasioned by the failure.

Persons ineligible to be attorney

21. A person is not eligible to be an attorney if the person is a minor, is mentally incapacitated or is an undischarged bankrupt.

Multiple attorneys

22. (1) A donor may appoint any number of persons to act jointly as attorneys or successively as an attorney.

Attorneys presumed successive

(2) If a donor appoints two or more attorneys in a springing or enduring power of attorney without indicating whether they are to act jointly or successively, the attorneys shall act successively in the order in which they are named in the document.

Decision by joint attorneys

23. (1) Subject to subsection (3) and the provisions of the springing or enduring power of attorney, where two or more attorneys are appointed to act jointly,

- (a) a decision of the majority, if there are three or more attorneys, is deemed to be a decision of all; and
- (b) if one or more of the attorneys die, renounce the appointment, become bankrupt or mentally incapacitated, or are unwilling or, after reasonable inquiries by another attorney, not available to make a decision, the remainder of the attorneys may make the decision and the decision of the majority of the remainder is deemed to be the decision of all.

Where no majority

(2) Unless otherwise provided in the springing or enduring power of attorney, where two or more attorneys appointed to act jointly disagree about the making of a decision and are unable to make a majority decision, the attorney first named in the document may make the decision.

Objection by joint attorney

(3) Where a decision is made by a majority under subsection (1) or by an attorney under subsection (2), an attorney who is under a duty to act under this Act is not liable for the consequences of the decision if he or she

- (a) does not at the time of the decision vote for or consent to the decision; and
- (b) provides a written objection to the decision to each of the other joint attorneys as soon as is reasonably possible after becoming aware of the decision.

Renouncing appointment

24. (1) When subject to the duty to act, an attorney may not renounce the appointment as attorney, except with the permission of the Court.

Renouncing where no duty to act

(2) When not subject to the duty to act, an attorney may renounce the appointment as attorney by providing a renunciation pursuant to section 12.

Accounting on demand

25. (1) During any period in which an attorney has a duty to act under this Act, the attorney shall provide an accounting in respect of the attorney's management of the property and financial interests of the donor, on the demand of any person named as a recipient of an accounting by the donor in the springing or enduring power of attorney.

Direction of Public Trustee

- (2) The Public Trustee may direct an attorney to provide an accounting if
- (a) on receipt of a request for accounting from any person, the Public Trustee considers the direction appropriate; or
 - (b) in other circumstances, the Public Trustee considers the direction to be necessary and in the public interest.

Powers of attorney executed outside Nunavut

26. A power of attorney executed in a place outside Nunavut is valid as a springing or enduring power of attorney in Nunavut if

- (a) it is valid according to the law of that place; and
- (b) it provides the appropriate statement as to its commencement or continuation, as referred to in paragraph 10(1)(e).

Powers of Court

27. (1) On an application by originating notice, made in respect of a springing or enduring power of attorney, the Court may, having regard to the power of attorney and the donor's intentions, make any order the Court considers appropriate, including the following:

- (a) an order providing advice or directions on any matter respecting the management of the property and financial interests of the donor;
- (b) an order directing that one or more documents or reports be provided to assist the Court in resolving issues raised by the application;
- (c) a judicial declaration pursuant to section 4;
- (d) an order declaring that a power of attorney is invalid or terminated;
- (e) an order removing the attorney appointed under the power of attorney;
- (f) an order requiring the attorney to provide an accounting to the Court;
- (g) an order varying the powers of the attorney;
- (h) an order appointing a person as an attorney in place of the attorney appointed under the power of attorney;
- (i) if the Public Trustee consents, an order appointing the Public Trustee in place of the attorney appointed under the power of attorney;
- (j) an order that the costs of the application be paid by the applicant, the estate of the donor, by a person not party to the proceeding, or in case of hardship by the Government of Nunavut.

Who may apply and when

(2) An application under subsection (1) may be made at any time after the execution of the power of attorney, by the donor, an attorney, the Public Trustee, a recipient of an accounting under subsection 25(1) or (2) or, in the discretion of the Court, any other person.

Notice

- (3) The applicant shall give notice of the application to the following:
- (a) the donor, unless the Court orders otherwise;
 - (b) the attorney;
 - (c) the Public Trustee;
 - (d) any other person, as the Court may order.

REGULATIONS

Regulations

28. The Commissioner, on the recommendation of the Minister, may make regulations

- (a) prescribing one or more professional groups for the purposes of subsection 3(4), and any conditions applicable to their eligibility;
- (b) prescribing the forms referred to in subsections 12(1) and (2);
- (c) prescribing the information to be included in or with a power of attorney under subsections 12(1) and (2);
- (d) respecting the exercise of the powers and the performance of the duties of the Public Trustee under sections 14, 25 and 27;
- (e) respecting access to documents filed in the register under section 14;
- (f) respecting the exercise of the powers and authority, and the performance of the duties of an attorney;
- (g) respecting any other matter considered necessary or advisable to carry out the purposes and provisions of this Act.

CONSEQUENTIAL AMENDMENTS

Land Titles Act

29. (1) The *Land Titles Act* is amended by this section.

(2) Subsection 127(1) is repealed and the following is substituted:

Filing powers of attorney

127. (1) Where a person, by executing a power of attorney, authorizes and appoints any person to act for or on behalf of the person with respect to the transfer or other dealing with land, in accordance with this Act, the power of attorney may be filed in a land titles office.

Declarations

(1.1) A springing power of attorney shall not be accepted for filing in accordance with subsection (1) unless accompanied by a certified copy of the declaration or declarations required by subsections 3 (3) and (4) or section 4 of the *Powers of Attorney Act*.

(3) Subsection 127(3) is repealed and the following is substituted:

Rights of owner

(3) The execution or filing of a power of attorney does not in any way affect the right of the owner of any land subject to the power of attorney to transfer or otherwise deal with that land.

(4) Section 129 is repealed and the following is substituted:

Revocation

129. (1) The Registrar may file the revocation or a notice of the termination of a power of attorney in the general register if the Registrar is satisfied that the revocation or notice contains a description of the power of attorney that is sufficient to identify it, where a power of attorney filed in a land titles office is

- (a) revoked, in the case of any power of attorney, or
- (b) terminated on the occurrence of one of the events or circumstances described in section 16 of the *Powers of Attorney Act*, in the case of a springing or enduring power of attorney.

Evidence of termination

(2) A notice of the termination of a power of attorney submitted for filing under subsection (1) must be accompanied by evidence, satisfactory to the Registrar, that the power of attorney has been terminated.

Effect of revocation

(3) Where a revocation or a notice of the termination of a power of attorney has been filed, a Registrar shall not accept a transfer or other instrument signed in accordance with that power of attorney after the execution of the revocation or the date of termination specified in the notice.

Public Trustee Act

30. (1) The *Public Trustee Act* is amended by this section.

(2) Section 3 of the *Public Trustee Act* is amended by adding the following after paragraph (d):

- (d.1) act as attorney on behalf of a person under a power of attorney to which the *Powers of Attorney Act* applies;

(3) Section 23 of the *Public Trustee Act* is repealed and the following is substituted:

23. Where the Supreme Court or judge of the Supreme Court is empowered to appoint a trustee, executor, administrator, attorney, guardian or committee, the Supreme Court may appoint the Public Trustee with the consent of the Public Trustee to any of the appointments.

COMMENCEMENT

Coming into force

31. This Act or any portion of this Act comes into force on a day or days to be fixed by order of the Commissioner.

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