

# ***Straith & Company***

## **Avoiding Conflict in the Use of Powers of Attorney**

By John E. Jordan

A general, enduring Power of Attorney is an invaluable legal and estate planning tool of choice to ensure that a person's assets and financial affairs will be properly managed when that person (the donor) is no longer capable of doing so themselves.

It is, of course, of the utmost importance for the donor to appoint one or more persons who will act as the donor's agent under the Power of Attorney solely in that person's best interest. This is because the attorney is what is termed a "fiduciary" and, as such, must exercise the authority granted by the Power of Attorney for the exclusive benefit of the donor and not for personal benefit. The attorney may only use the Power of Attorney and derive personal benefit if

1. the Power of Attorney authorizes the attorney to do so; or
2. the donor is fully capacitated and consents to the proposed transaction and has complete knowledge of it.

The strict application of this fiduciary principle can, however, hinder the intent of the donor if the Power of Attorney is not carefully drafted to reflect the exact intent of the donor. We see this in cases where the donor has executed the "bare bones" standard form Power of Attorney as set out in the *Power of Attorney Act* of British Columbia. This most common form authorizes the attorney to "do anything I may lawfully do by an attorney" but does not specify what exactly this phrase means. With no further language to clarify what the donor means, any transaction which appears to give a financial benefit to the attorney will be prohibited because of the actual or perceived conflict of interest. However, it is often necessary and even advisable for the attorney, in family or business circumstances, to deal, in good faith, with the donor's affairs where it results in a conflict of interest. The following are several examples:

1. A mother has appointed her daughter, one of 4 children, to act as her attorney. Mother wants the gifting programme she began to her children and grandchildren to continue after her incapacity and until death. She trusts her daughter completely. If she becomes incapable, she intends her daughter to continue to pay annual gifts to her daughter, other children and grandchildren. But a standard generic Power of Attorney does not permit this gifting programme because the daughter benefits from it.
2. A husband appoints his wife as attorney under Power of Attorney with the intent that she be able to utilize his assets, which are not jointly registered with his wife, for her welfare and for that of his children if he should become incapacitated. A standard generic Power of Attorney will not allow his wife to carry out his intentions.
3. A mother appoints her son, one of two children, as her attorney. She has expressed to both children that if she becomes incapable, she wishes to reside with her son and his family. This may mean the son will have to make substantial renovations to his home to accommodate his mother. Again, a standard generic Power of Attorney will not permit

him to use his mother's funds to renovate his home even though this is his mother's express intent and desire.

In all of three of these situations, the attorney is prevented from carrying out the intent of his or her spouse or parent because he or she is placed in a conflict of interest position and would be committing a breach of trust if he or she acceded to his or her spouse or parent's wish. The solution is to draft a Power of Attorney that expressly and, in detail, reflects the donor's wishes. As precise drafting is crucial, the donor is well advised to seek out an experienced professional. The additional time and experience of an experienced legal practitioner in elder law issues is of enduring value. Without proper drafting, the donor can realistically expect family disagreements and disputes in these types of situations when the Power of Attorney is activated. While drafting Powers of Attorney to anticipate these kinds of family situations has its dangers, these dangers can be curtailed, for instance, by placing limits on the powers granted to the attorney or appointing more than one trusted person to act. These are only two of many ways to ensure the donor's financial affairs are handled properly and in accordance with his or her express wishes.

Copyright © 2008, John E. Jordan

Permission is given to copy or distribute provided there is no deletion, addition or amendment.  
However, before reprinting or publishing, please contact the author at (250) 386-1434.