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Drafting Considerations for Wills and Estate Practitioners

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Risks Facing the Innocent Attorney: A Discussion of Personal Liability When Acting under a Power of Attorney

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**RISKS FACING THE INNOCENT ATTORNEY: A DISCUSSION OF PERSONAL LIABILITY WHEN ACTING
UNDER A POWER OF ATTORNEY**

Introduction2

Duties of an Attorney at Common Law and under Legislation.....2

 Statutory Duties2

 Common Law Duties.....3

Common Types of Litigation Faced by Attorneys5

 Validity of the Document.....5

 Suspicious Circumstances6

 Struggles for Control.....6

Consequences of Litigation to the Innocent Attorney.....7

 Costs of Litigation7

 Damage to Family Relationships8

 Reputational Harm8

 Inability to Carry Out Duties9

Protecting the Innocent Attorney 10

 Existing Statutory Protections 10

 Discussing Potential Issues with the Donor..... 10

 Adding Protection Clauses in the Power of Attorney 11

Conclusion..... 12

INTRODUCTION

An attorney under a power of attorney may have the best of intentions. Yet if the attorney is unfamiliar with the scope and nature of their duties, or is ill-equipped to discharge them, they may face unanticipated personal liability. This paper outlines the duties of an attorney, the common types of litigation faced by attorneys, the adverse consequences of litigation arising from a power of attorney, and some measures to be taken to protect attorneys from personal liability.

DUTIES OF AN ATTORNEY AT COMMON LAW AND UNDER LEGISLATION

Statutory Duties

In Alberta, both the *Power of Attorney Act*¹ and the *Trustee Act*² apply to attorneys. Attorneys have a number of duties under these statutes and at common law. These duties represent “the minimum legal expectations of attorneys exercising their powers.”³

Under section 8 of the *PAA*, unless the power of attorney provides otherwise, where an attorney acts under an enduring power of attorney (or otherwise indicates they have accepted the appointment) and the enduring power of attorney has not been terminated, the attorney has a duty to exercise the attorney’s powers to protect the donor’s interests 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.

This provision imposes a positive duty on an attorney to act. An attorney will be in breach of their statutory duty if, having been appointed, they refuse to do anything, even if they do not engage in any active misfeasance.⁴ An attorney who breaches this duty may be sued by the donor (or the donor’s estate).⁵

Sections 2 to 8 of the *Trustee Act* apply to an attorney exercising a power of investment under an enduring power of attorney.⁶ The most important of these provisions are sections 3 and 5. (Section 4, which protects a trustee from liability, is discussed below.) Under section 3, an attorney must

¹ RSA 2000, c P-20 [*PAA*].

² RSA 2000, c T-8.

³ Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Final Report (Edmonton: Alberta Law Reform Institute, 2008) at para 71 [*WCLRA, Final Report*].

⁴ *Ibid* at para 78.

⁵ Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse*, Final Report No. 88 (Edmonton: Alberta Law Reform Institute, 2003) at para 18 [*ALRI, Final Report No. 88*].

⁶ *PAA*, *supra* note 1, s 7.1.