



CHECKLIST: VALIDITY OF A CONTINUING POWER OF ATTORNEY FOR PROPERTY (“CPOAP”) PURSUANT TO THE SDA¹

To make a valid CPOAP, a Grantor MUST...

- be at least 18 years old
- be capable of granting a CPOAP
- properly execute the CPOAP document with the requisite two witnesses and their signatures and clarity as to the document being “continuing”

When making a CPOAP, a Grantor NEED NOT...

- adhere to any particular form
- be capable of managing one’s property

When making a CPOAP, a Grantor MAY...

- adhere to a prescribed form
- appoint two or more attorneys
- indicate how two, or more, attorneys shall act. However, where two or more attorneys are appointed, and the CPOAP is silent as to how they shall act, they are to act jointly
- stipulate how attorneys are to act where two, or more, attorneys have been appointed and one, or more, die, becomes incapable, or resigns
- consider for a springing clause which will postpone the effective date of the CPOAP until a specified date or specified event/contingency occurs

An Attorney under CPOAP CANNOT...

- make a Will on behalf of the grantor
- act under a terminated or invalid CPOAP, unless they act in good faith and without knowledge of the termination or invalidity of the CPOAP

¹ *Substitute Decisions Act, 1992*, SO 1992, c 30 [SDA].

A CPOAP is TERMINATED WHEN...

- the attorney dies, becomes incapable of managing property or resigns and the CPOAP is silent as to whether this attorney can be replaced or substituted
- the court appoints a guardian of property for the grantor under section 22 of the SDA
- the grantor executes a new CPOAP, unless the grantor arranges for multiple CPOAP's to be simultaneously active
- the CPOAP is revoked, in writing, and executed in the same way as a CPOAP
- when the grantor dies

Proper Execution of a CPOAP

Generally

To be properly executed, the CPOAP document must either state that it is a continuing power of attorney or express the intention that the authority given may be exercised during the grantor's incapacity to manage property and be witnessed and signed by two witnesses

Witnessing

A CPOAP is executed when it is signed in the presence of two witnesses

A witness CANNOT be:

- the attorney; or
- the grantor's spouse or partner;
- the grantor's child or a person who the grantor has demonstrated a settled intention to treat as a child;
- a person whose property is under guardianship, or who has a guardian of the person; or
- a person who is less than 18 years old

Remote Witnessing

A CPOAP is witnessed and/or revoked remotely where:

- audio-visual technology that permits participants to see, hear and communicate with one another in real time is used
- at the time of the witnessing, at least one witness is a licensee within the meaning of the *Law Society Act*
- the signatures are contemporaneously made (signature by counterpart accepted) and,
- all other procedural requirements, if any, are met

CPOAP to be Effective Upon Incapacity

Where a CPOAP provides that it comes into effect when the grantor becomes incapable of managing property but does not provide a method for determining whether that situation has arisen, the CPOAP comes into effect when:

- an assessor notifies the attorney, in the prescribed form, that they have performed an assessment of the grantor's capacity and has found that the grantor is incapable or managing property or,
- a certificate of incapacity has been issued for the grantor under the *Mental Health Act*²

This checklist is intended for the purposes of providing information and guidance only and is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Dated March 11, 2022.

² RSO 1990, c M7.