

LAW REFORM
COMMISSION
OF
NOVA SCOTIA



What Do You Think?

Powers of Attorney in Nova Scotia

Response Booklet - May 2014

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**Powers of Attorney
in Nova Scotia**

RESPONSE BOOKLET

May 2014

The Law Reform Commission of Nova Scotia is proposing changes to the law that applies to powers of attorney in Nova Scotia. The Commission has released a Discussion Paper, which is available on the Commission's website: www.lawreform.ns.ca. We would like to know what you think.

This booklet summarizes some of the Commission's proposals, and asks for your comments. We also ask you to describe your experiences with powers of attorney.

HOW TO RESPOND:

You can fill out this booklet on your computer and email it to us at: info@lawreform.ns.ca

Or you can fill it out by hand and mail it to us at:

Law Reform Commission of Nova Scotia
1484 Carlton Street
Halifax, Nova Scotia B3H 3B7

If you run out of space, please feel free to use a separate sheet of paper.

If you would like to contact us directly you can email us at: info@lawreform.ns.ca, or call us at (902) 423-2633.

Please be aware that Nova Scotia's freedom of information laws may require us to release information, including personal information, that you share with us.

WHAT IS THE LAW REFORM COMMISSION?

The Law Reform Commission of Nova Scotia is an independent agency established under the *Law Reform Commission Act*. The Commission makes recommendations for the improvement and modernization of Nova Scotia laws and the administration of justice. The Commission is funded by the Government of Nova Scotia and the Law Foundation of Nova Scotia.

WHAT IS A POWER OF ATTORNEY?

A power of attorney is a legal document that gives one person - the "attorney" - the authority or power to make decisions and take action on behalf of someone else.

The person who appoints the attorney to help with handling property and finances is called a **donor**. The person who is appointed to help the donor is called an **attorney**. In this case, "attorney" does not mean lawyer - a person does not have to be a lawyer to be an attorney under a power of attorney.

A power of attorney authorizes the attorney to make decisions and take action with regard to the donor's money and other property. The attorney may be asked to help with banking, paying bills, managing investments and selling property, among other things. A power of attorney can be helpful, for example, where the donor has difficulty getting around and wants someone else to do banking and other sorts of transactions.

A donor does not lose the ability to make legal decisions by making a power of attorney. As long as the donor has the mental ability to make decisions for himself the donor can give instructions to the attorney, which the attorney must follow. The donor, if he wishes, can also continue to deal with his property and finances on his own, even

though he has also given authority to the attorney to do so.

In Nova Scotia, an “enduring power of attorney” is a special kind of power of attorney that allows the attorney to deal with the donor’s property and finances, even if the donor is not able to make legal decisions for him or herself. In law, a person cannot make a legal decision when he is not able to understand information relevant to the decision, or the consequences of making that decision.

Many Nova Scotians have made enduring powers of attorney to ensure that if they become incapacitated - meaning that they are unable to make decisions about their finances or property - there is someone they can trust to look after their affairs.

If a person has not made an enduring power of attorney, and is no longer able to make decisions for himself, a family member or friend may ask a court to be appointed as the person’s legal guardian. This is usually a more expensive and public process than making a power of attorney.

Normally, the attorney has the power to deal with the donor’s property and finances as soon as the enduring power of attorney is signed and properly witnessed. Some people choose to make “springing” powers of attorney,

that take effect only when the donor is declared to be incapable of making legal decisions for him or herself. Once the donor is declared to be incapacitated, the donor has the power to deal with the donor's property and finances, but not before.

A power of attorney is a very powerful document. It gives the attorney control over the money and other property of the donor.

Because an attorney has the power make decisions about the donor's property, the attorney has special legal duties. For example, the attorney must follow the donor's directions as to how the donor's property should be handled.

As well, the attorney cannot give the donor's money to other people, or use the donor's money or property for himself, unless the donor says so, or it is permitted by the power of attorney document. The attorney must keep the donor's money and other property separate, and not put it in her own bank account. The attorney must tell the donor how he is using the donor's money and property when asked by the donor. The attorney must keep records of what the attorney has done with the donor's property - for example bank statements, bills, and receipts.

If the donor does not think that the attorney is handling her money or property appropriately, as long as the donor is still able to make legal decisions for herself the donor can cancel or revoke the power of attorney. The donor, or someone else, can take legal action against the attorney, to find out what the attorney has done with the donor's property, to cancel the power of attorney, and in some cases to recover the donor's property. A criminal prosecution may also be pursued in some cases.

REFORM OF THE POWERS OF ATTORNEY ACT

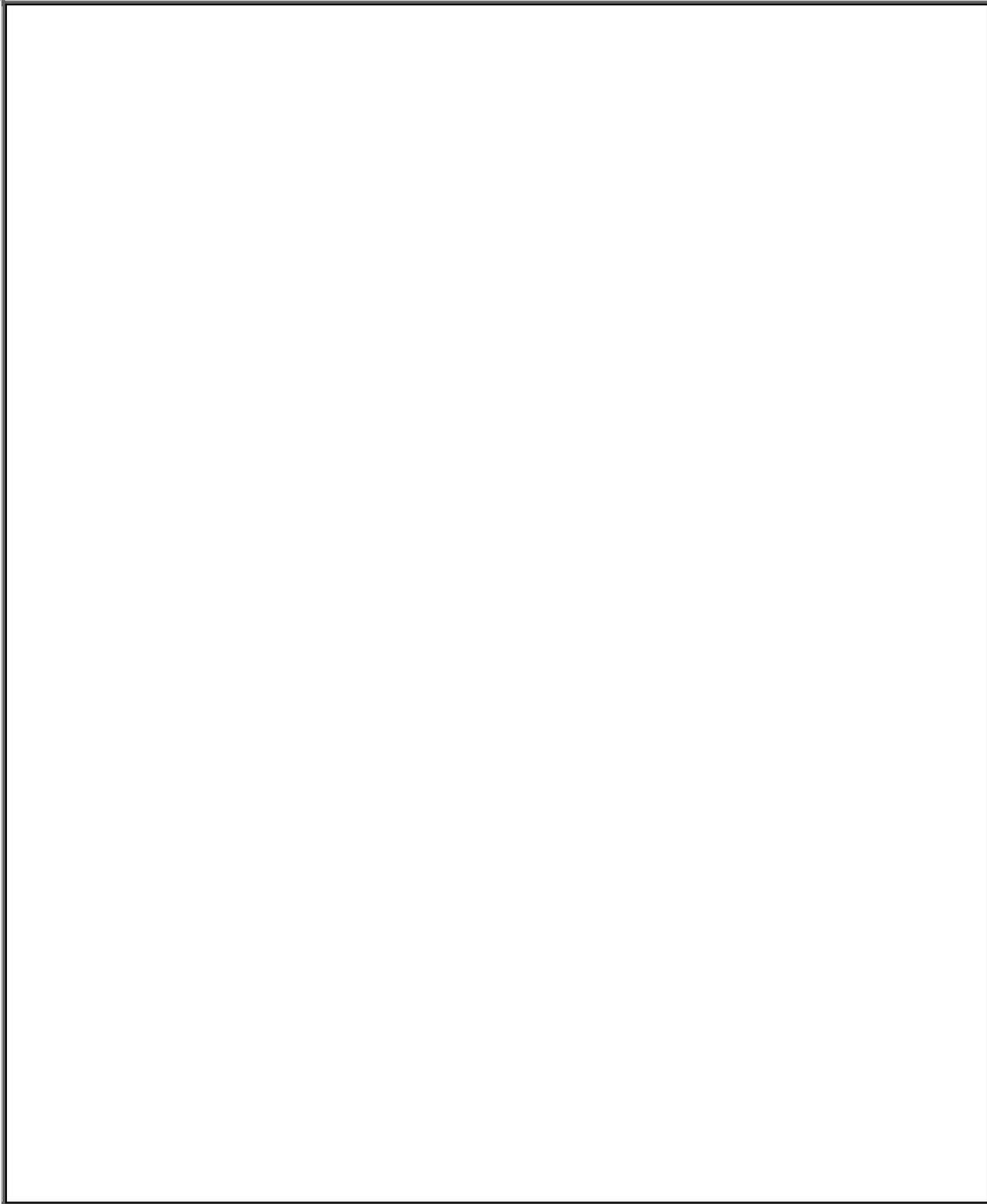
The *Powers of Attorney Act* is the law that permits a person to create an enduring power of attorney - a power of attorney that will remain legally in effect even though the donor has become incapable of making decisions.

The Law Reform Commission is considering reforms to the *Powers of Attorney Act* to make the law clearer, to make powers of attorney more effective and accessible, and to better protect donors against financial abuse using a power of attorney. This booklet asks for your comments and suggestions on some of the proposed reforms.

After considering your comments, the Commission will publish a Final Report, with recommendations for reform of the *Powers of Attorney Act*.

POWERS OF ATTORNEY: HOW DO THEY WORK FOR YOU?

Have you made a power of attorney? Why did you make it?
If you have not made one, why not?

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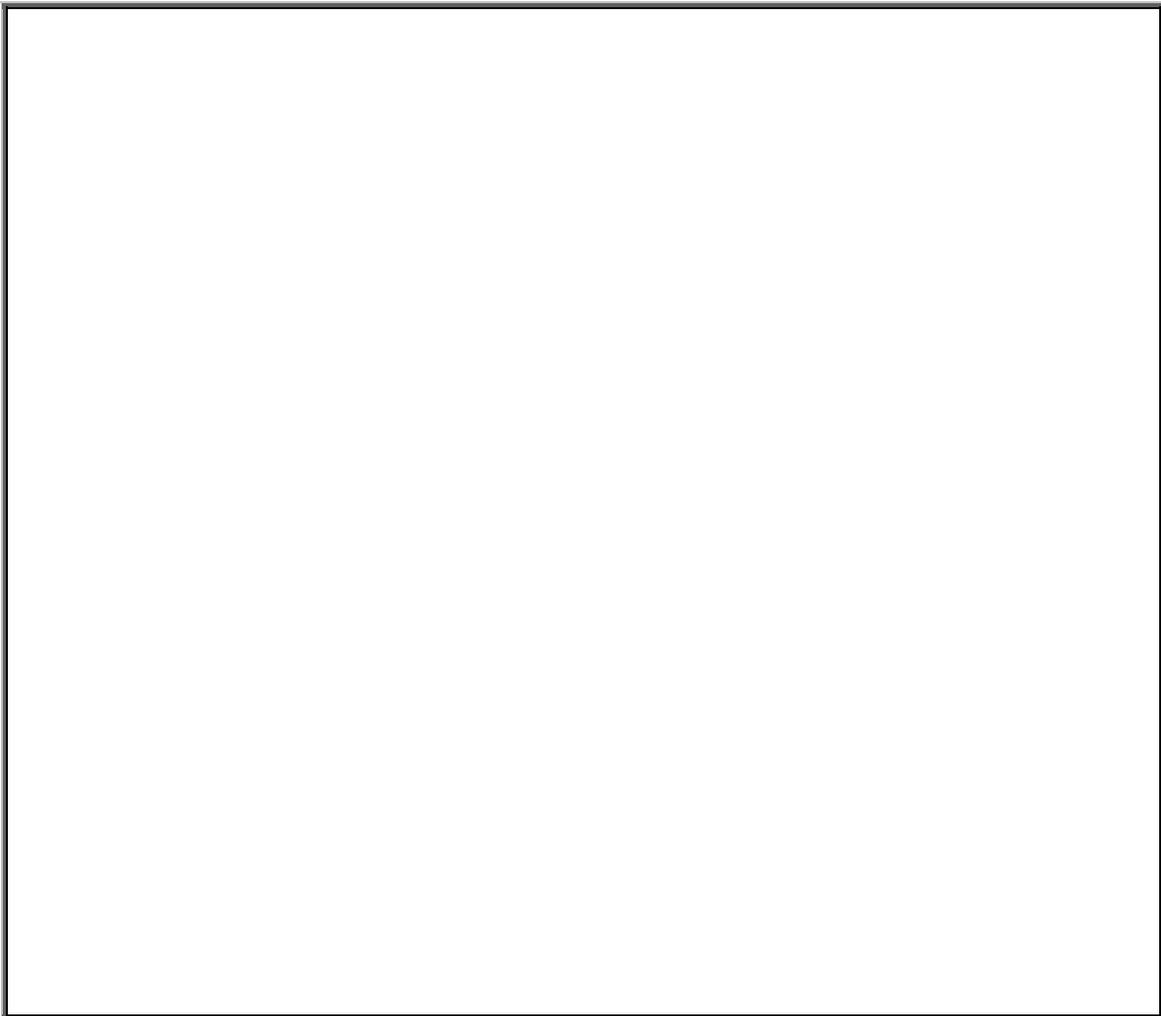
Which person did you name as your attorney (or alternate attorney)? If you have not made a power of attorney, who would you likely choose?

- A close friend
- A family member
- A colleague
- A social worker
- A health care professional
- A financial advisor
- Someone else

Why did you, or would you, choose this person to be your attorney?

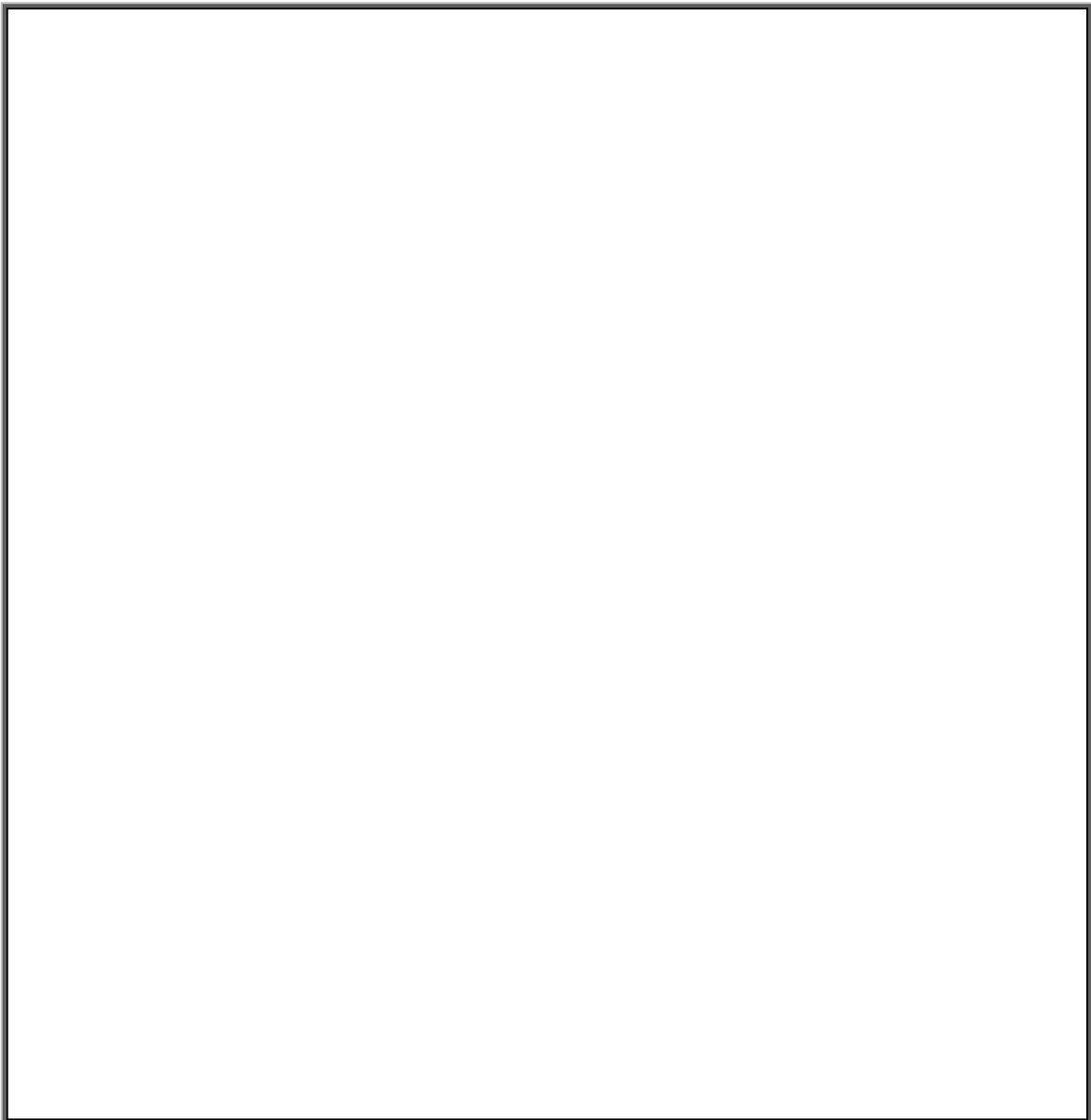
Some people name two or more people as attorneys, to make decisions together. By law, both attorneys have to agree on these decisions - for example, whether to sell the donor's car to raise money. The attorneys can keep an eye on each other and can share their opinions on any decision that has to be made. But if they disagree it can cause problems.

If you have made a power of attorney, did you name more than one attorney? If not, would you consider doing so? Why or why not?



If you have made a power of attorney, has the experience of having a power of attorney been a good one? Why or why not?

For example, have you had any problems with a third party like a bank not accepting your power of attorney? Has your attorney kept you informed? Has your attorney respected your wishes?



Have you ever been appointed as an attorney?

Yes

No

Has the experience of acting as an attorney been a good one? Why or why not?

For example, have you had any problems getting a third party like a bank to accept the power of attorney? Do you feel that you had enough information about the responsibilities of being an attorney?

WHAT DO YOU THINK? REFORM OF THE POWERS OF ATTORNEY ACT

Making a Power of Attorney

Because a power of attorney is such a powerful legal document most people ask a lawyer to prepare one, so they fully understand what they are signing. A lawyer can also help protect the donor by writing a power of attorney that places special obligations and responsibilities on the attorney. But some people make their own powers of attorney, or find them on the internet, which can save money on lawyer's fees.

Should a person have to get a lawyer's advice in order to make a valid power of attorney? Why or why not?



In order to make a power of attorney, a donor must have the ability to understand what it means to make a power of attorney, and the consequences of making one. In law, a donor is presumed to understand these things, unless it is shown that the donor does not. If the donor is not able to understand the nature and consequences of making a power of attorney, the power of attorney will not be valid.

Do you agree that in order to make a power of attorney, a donor should be able to understand the following (with help if necessary):

What kinds of bank accounts, investments and other property the donor owns, and their approximate value:

Yes

No

That the donor has a legal duty to financially support his or her children under 19 and his or her spouse or common law partner:

Yes

No

That the attorney will be able to do anything in respect of the donor's property and finances that the donor could do, unless it says otherwise in the power of attorney document:

Yes

No

That if the attorney makes bad decisions the donor may lose money, or the donor's property may lose value:

Yes

No

That if the attorney is not trustworthy, the attorney may take the donor's money:

Yes

No

That the donor may cancel the power of attorney while the donor is able to make legal decisions for him or herself, but will not be able to cancel the power of attorney once the donor is incapable of making legal decisions:

Yes

No

If you answered "No" to any of the above, why did you do so?

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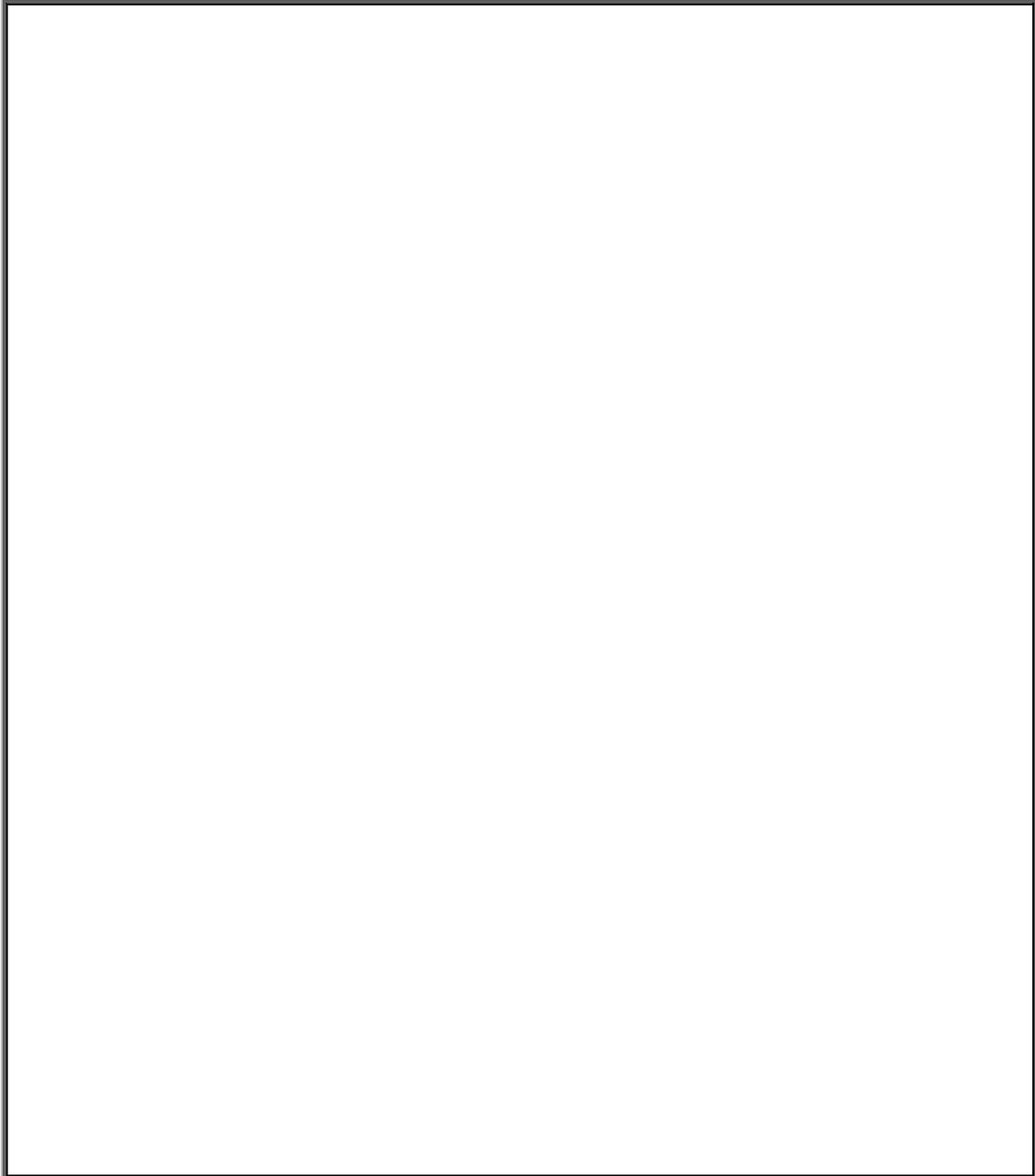
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A registry of powers of attorney

The Commission has proposed that the Government of Nova Scotia should set up a registry of powers of attorney. This would be like the Vital Statistics registry of births, or the registry of land titles - a place where information about the power of attorney is available to other people. Donors would have the option to register their powers of attorney, so that banks, lawyers, police and others could be certain which is the correct and most up-to-date power of attorney. This could also help to prevent fraud by someone using a fake power of attorney.

Only some people would be allowed to check the registry - the information would not be available to the general public.

What do you think? Would you register your power of attorney if there was such a registry? If so, how much would you be prepared to pay? For example, in Nova Scotia it costs \$24.20 to register a domestic partnership (a type of common law relationship), and \$160.85 for a legal change of name.



Privacy and Personal Information

The registry would include identifying information about the donor and the attorney, such as names and dates of birth.

What other information should be included in the registry:

A list of the attorney's powers and any limits on those powers?

Yes

No

A copy of the power of attorney document?

Yes

No

What other information should be included? Why?

Who should be able to look at the information in the registry (unless the donor indicates otherwise):

The donor's doctor?

Yes

No

Staff at the donor's bank?

Yes

No

Police?

Yes

No

A manager of a care home where the donor is living?

Yes

No

Why should these people be able to view the information in the registry? If you answered "No" to any, why not?

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Who else should be able to view the information in the registry? Why?

Springing Powers of Attorney

Some people make “springing” powers of attorney, that come into effect only when the donor is declared to be incapacitated - meaning someone else decides and declares that the donor is not able to make decisions for himself. The attorney has no power until the donor is declared to be incapacitated.

Do you think that only a medical professional should be allowed to decide and declare that the donor is incapacitated? Or should the law allow the donor to name a friend or family member to decide and declare that the donor is incapacitated, if that is what the donor wants? Should the donor be able to name the attorney to decide and declare that the donor is incapacitated?

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Who can be an attorney

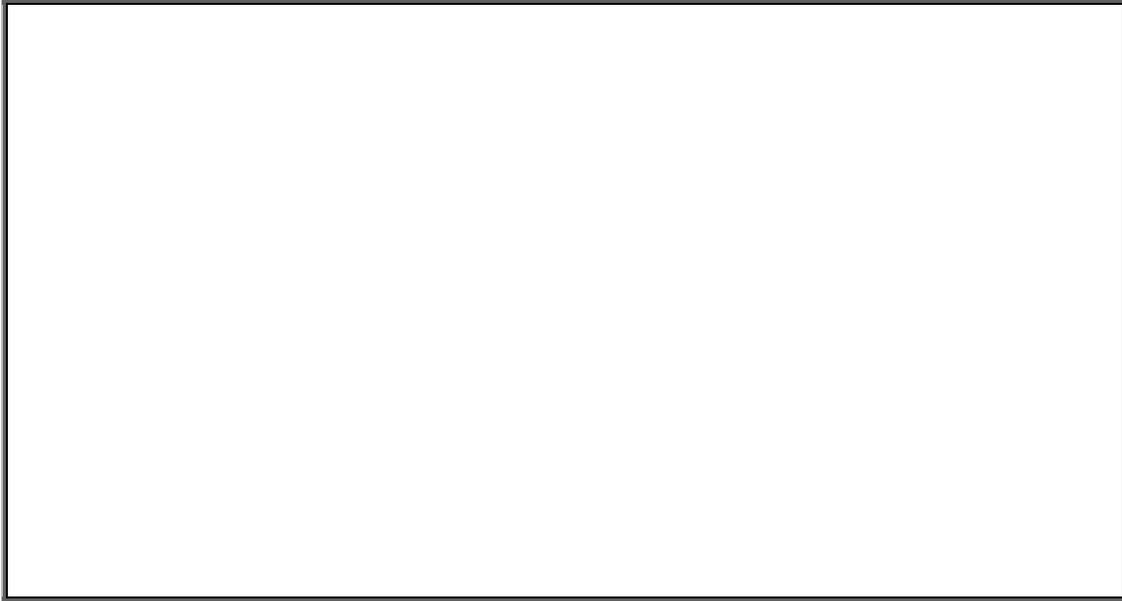
Many people choose their spouse (wife, husband or common law partner) to be their attorney. But marriages and common law relationships break down. Do you think that a power of attorney which names a husband or wife to be the attorney should automatically be cancelled or terminated if they divorce? Why?

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What if the spouses or common law partners separate or stop living together, with the intention of ending the relationship?

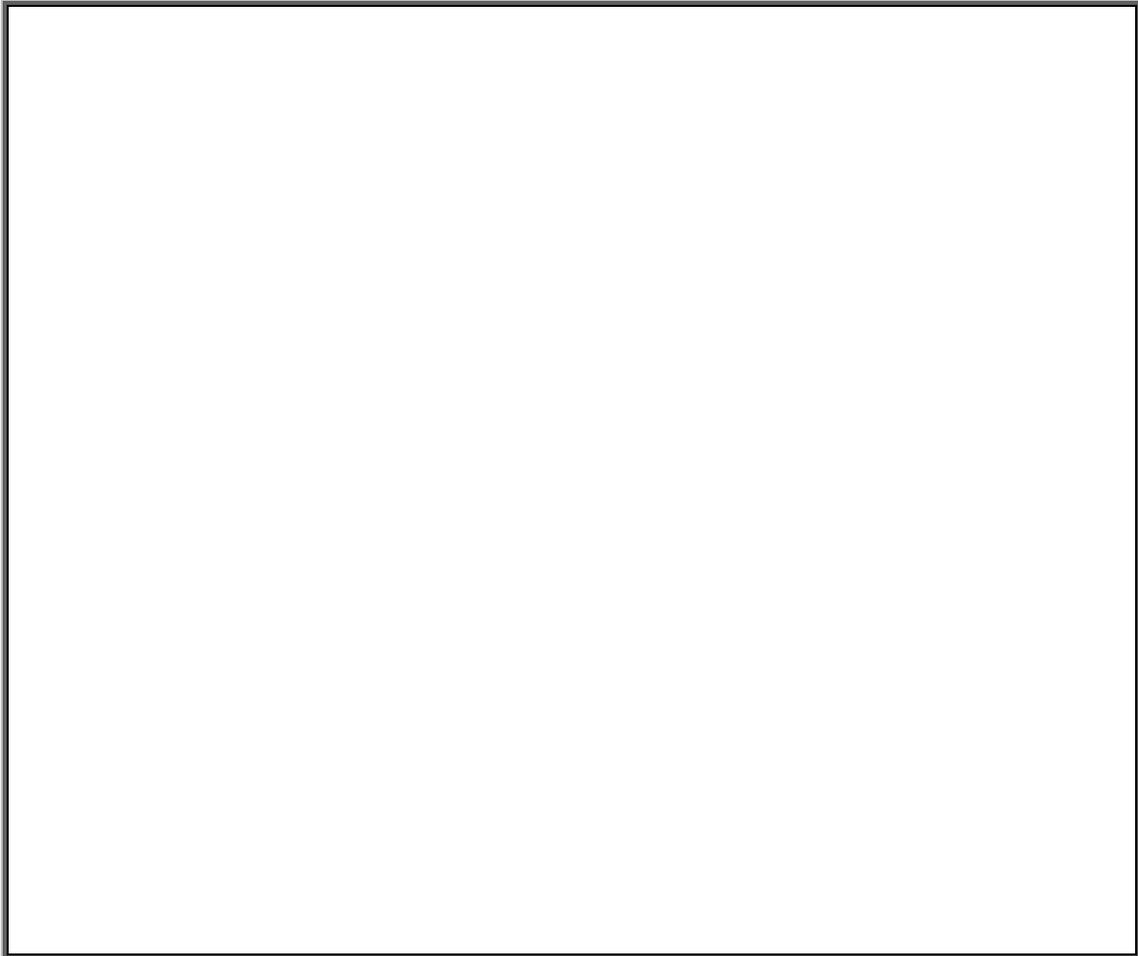
Should a person who has been convicted of fraud be able to act as an attorney? What if the donor has indicated in writing that he knows about the conviction?



Should someone who has gone bankrupt and has not been discharged from bankruptcy be able to act as attorney? What if the donor has indicated in writing that he knows about the bankruptcy?



Should a paid personal care worker, such as a housekeeper or home care worker, of the donor be able to act as attorney? Why or why not?



Notifying someone when the attorney begins to act

Currently, an attorney is not required to notify anyone else when the attorney begins to deal with the donor's property and finances, unless the donor tells the attorney to do so.

The Commission has proposed that an attorney should be required to notify someone in writing when the attorney

begins to deal with the donor's property and finances - such as by paying bills or dealing with bank accounts and investments.

The notice from the attorney would tell the person who receives it that the attorney has begun to act as the donor's attorney. The notice would explain what the attorney's powers and responsibilities are, and describe what family members and friends can do if they think the attorney is misusing the donor's money.

The purpose of this requirement would be to ensure that someone the donor trusts will know when the attorney has begun to act for the donor. Otherwise, the attorney may begin to deal with the donor's property with no one knowing.

The donor could name someone to receive the notice in the power of attorney document. If no one is named the notice would be delivered to the donor's immediate family. The donor could choose not to put this requirement on the attorney by saying so in the power of attorney document.

What do you think? If you were the donor, would you want someone else to know when the attorney has begun to deal with your property and finances? Is this too much of a

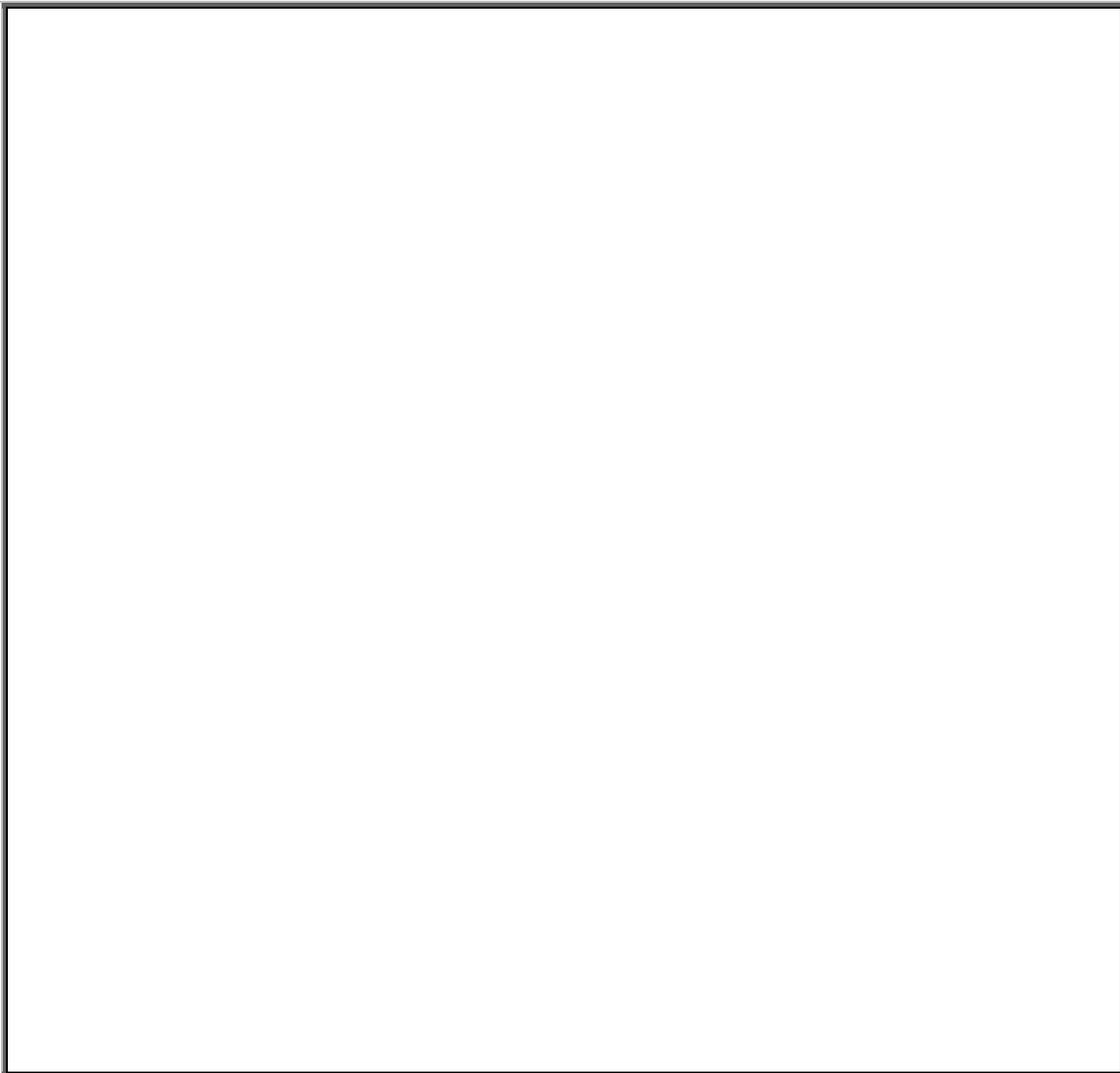
burden on the attorney? What problems do you think the attorney may run into in sending out the notice?

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Gifts

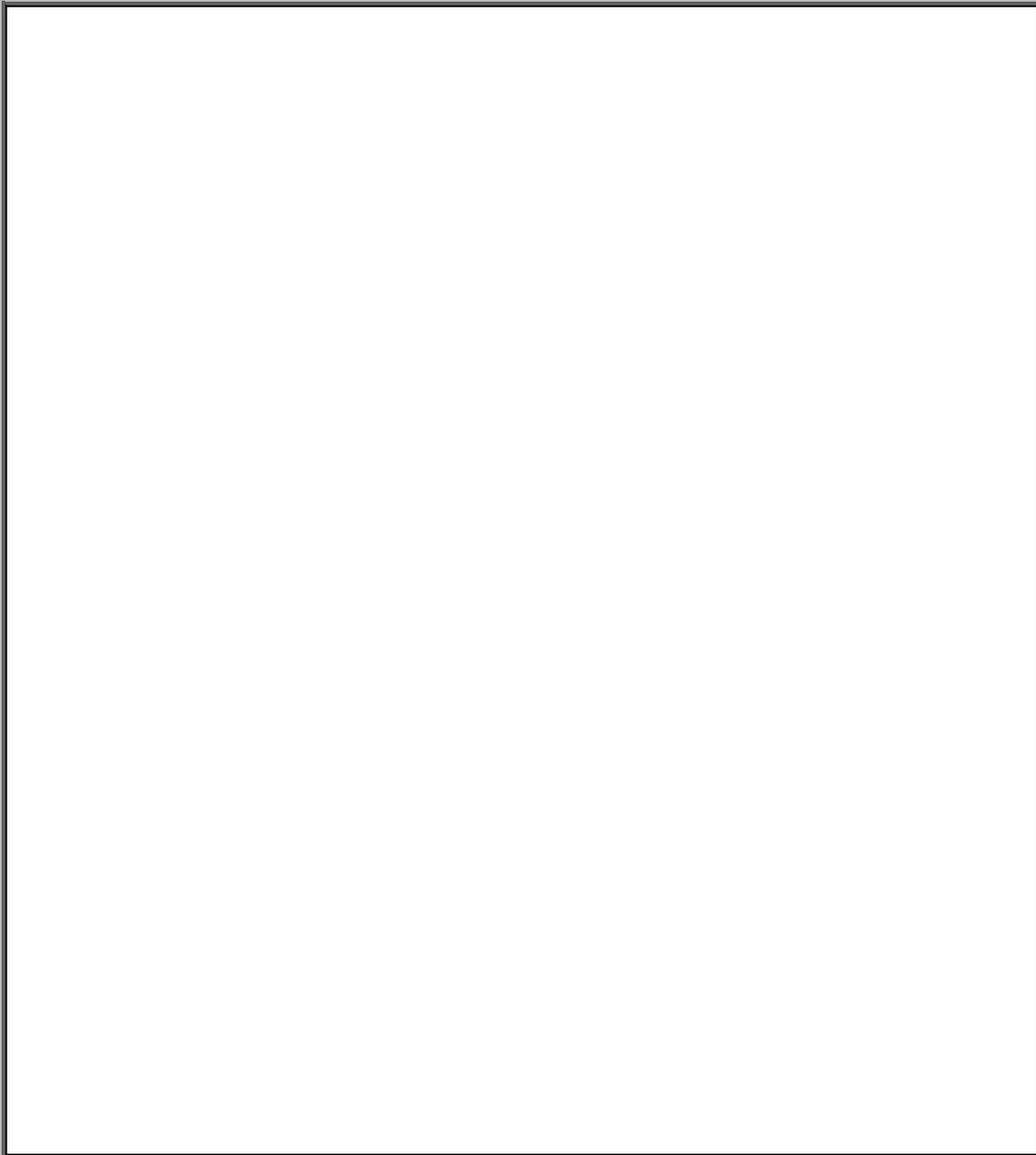
Should the attorney be allowed to use the donor's money to make gifts to family or friends, or the attorney himself, if the donor is no longer capable of making decisions for himself? What if the donor had a pattern of making gifts to family members, or a charity?

Or should there have to be clear permission to make gifts in the power of attorney document?



Compensation for the attorney

Should the law allow an attorney to claim reasonable compensation for the attorney's time and effort, like a small commission, from the donor's property, even if there is no specific permission for it in the power of attorney document? Why or why not?



Accounting

The law currently requires an attorney to explain how he has used the donor's property when the donor asks. This is called an "accounting".

The donor can also name someone else in the power of attorney document to whom the attorney is required to give an accounting. Also, if the donor is not capable of making decisions, a court may require an attorney to explain how he has used the donor's property.

The Commission has proposed that if the donor does not name someone else to whom the attorney is required to give an accounting, the attorney should be required to give an accounting to the donor's nearest available relative, once a year. The donor could choose not to put this requirement on the attorney by saying so in the power of attorney document.

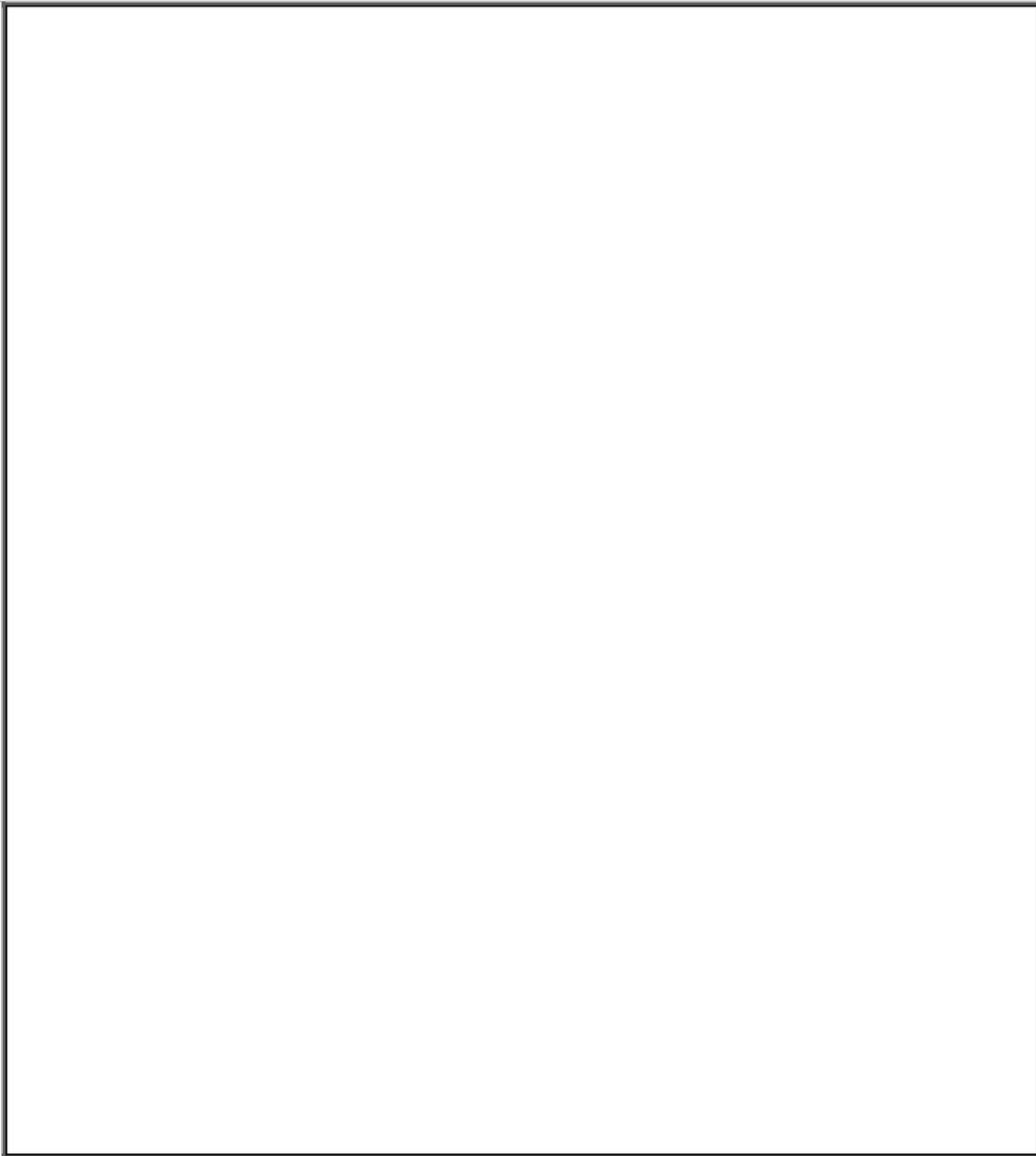
What do you think?

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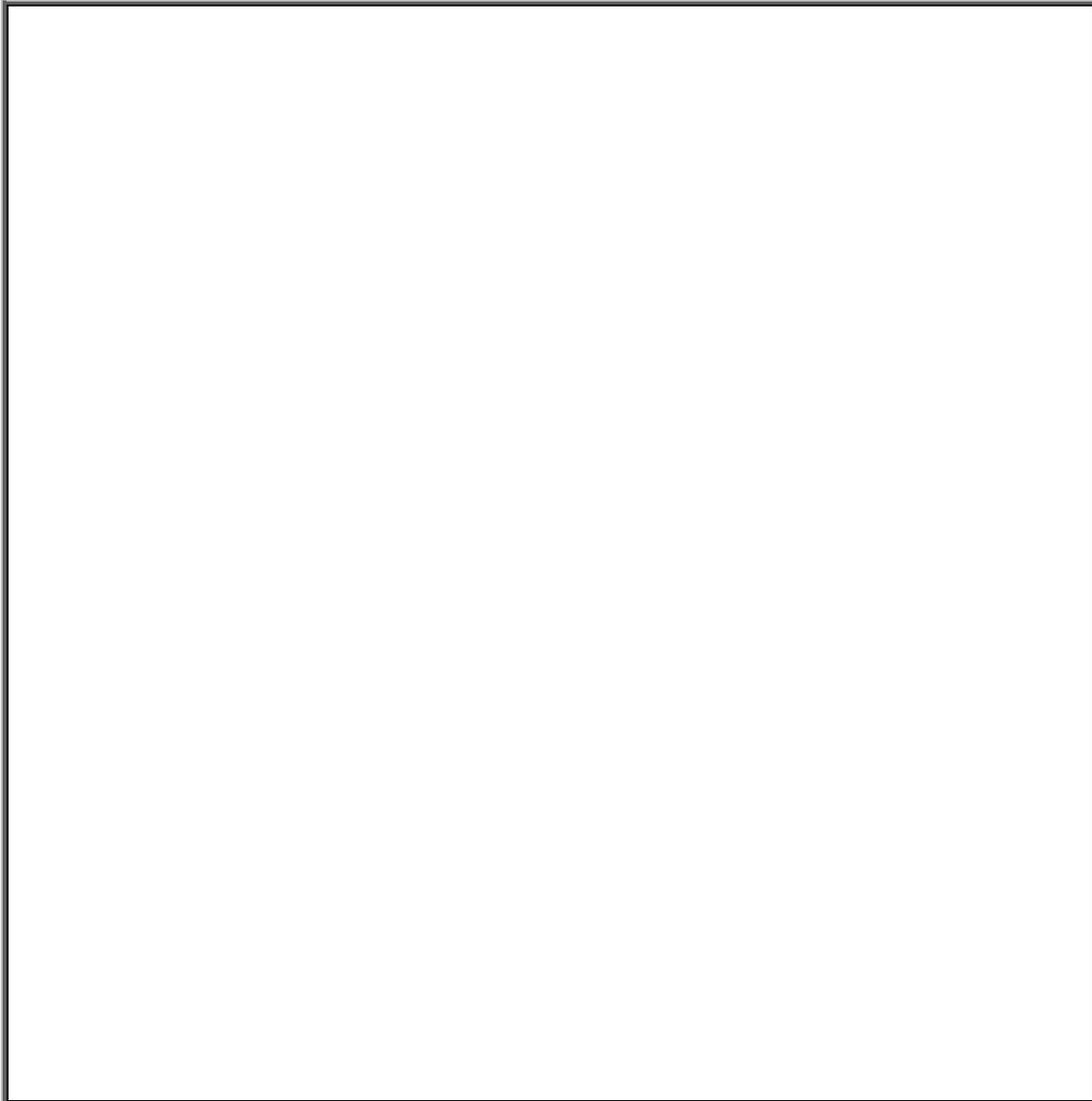
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Applying to court to change a power of attorney

Should a court have the power to change any conditions in a power of attorney, if the donor is no longer able to consent or make the change herself, and the change would be in the donor's best interests (for example, to save taxes)? Why or why not?



Should a court be able to substitute another person not named in the document to be the attorney, if the donor is not able to appoint a new attorney, and the change would be in the donor's best interests?

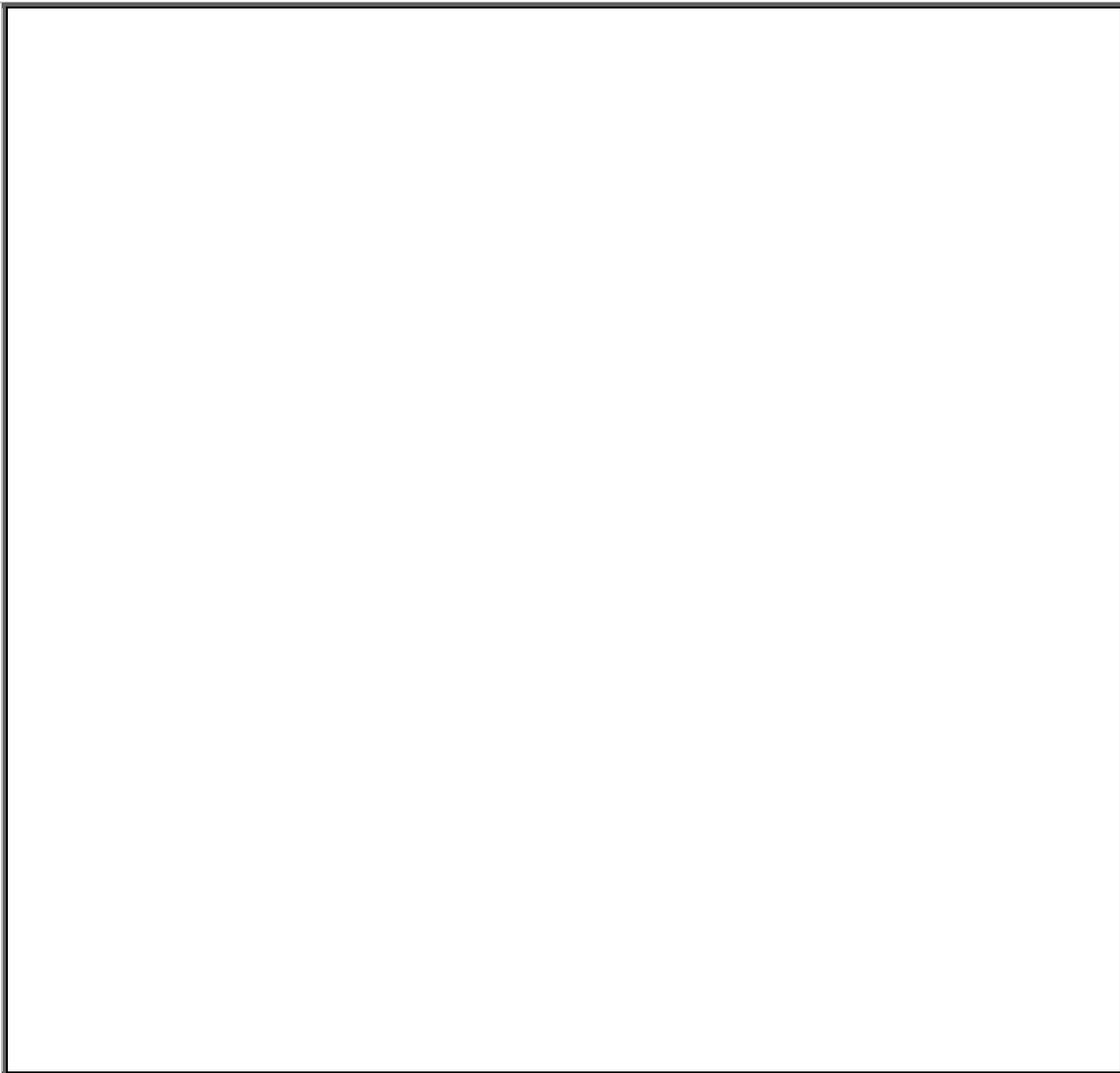


Resigning as attorney

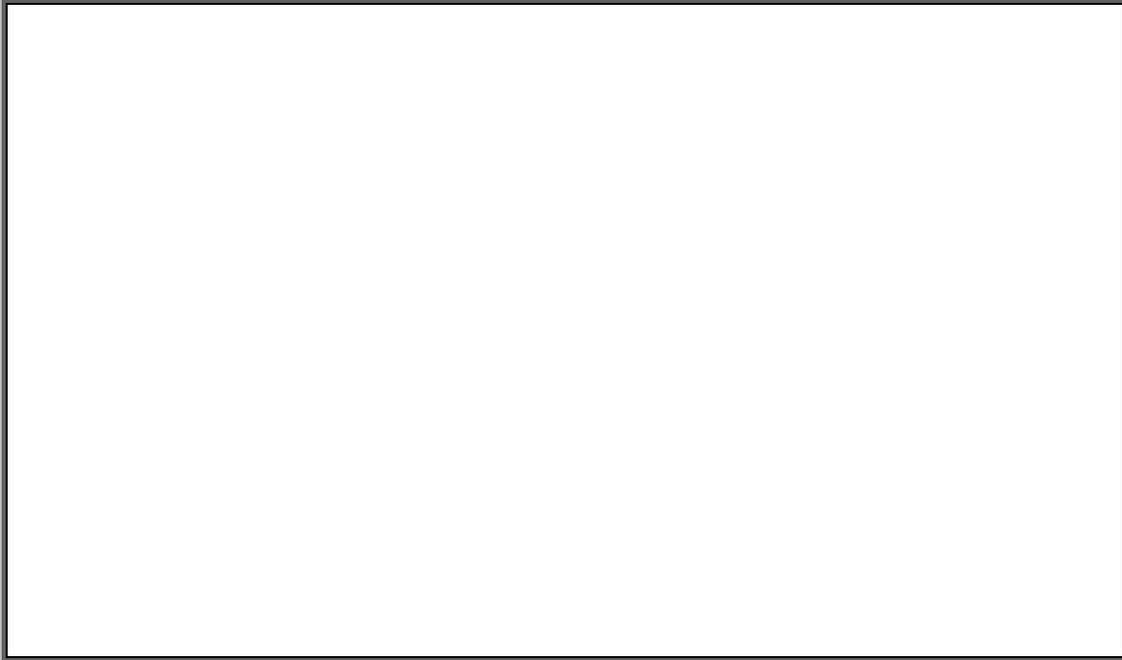
An attorney may wish to resign, and stop acting as attorney. But the donor may not be legally capable of making a new power of attorney because he is no longer

capable of making legal decisions. In that case, should the law require the attorney to tell someone else before resigning?

In particular, if there is no alternate, or “backup” attorney named in the power of attorney document, should the attorney have to notify the donor’s immediate family members (meaning the donor’s spouse, adult children, parents, and brothers and sisters)? Why or why not?



If none of the donor's immediate family are available should the attorney have to notify members of the donor's extended family before resigning? Why or why not?



Who else should the attorney have to notify before resigning - for instance, a friend, colleague, health care professional or financial adviser of the donor? Why?



What if a bank suspects financial abuse?

In your opinion, if a bank suspects misuse of a power of attorney, and the donor is not able to deal with the situation because he is unable to make decisions for himself, who should the bank notify?

For example, if the bank suspects that an attorney is using the donor's money for herself, should the bank notify the donor's immediate family members? What about the donor's privacy? Could notifying family members put the donor at greater risk of abuse? How would you want the bank to handle the situation?



What other suggestions would you make to improve the laws that apply to powers of attorney?

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Thank you!

Thank you very much for taking the time to give us your responses. Your views will help us to improve the laws of Nova Scotia that apply to powers of attorney.

For more information about powers of attorney, contact the Legal Information Society of Nova Scotia:

1-800-665-9779

www.legalinfo.org