

## **BACKGROUND**

Most instruments (1) executed by an individual must be witnessed by a person who must sign his name to the instrument as a witness and then make an affidavit of attestation, commonly called an affidavit of execution, in the prescribed form (FORM 31) (2). The requirement for a witness and an affidavit of attestation is a safeguard against forgery and enables the execution of a document to be proved in court by an independent party. A deficiency in meeting the attestation requirements does not invalidate a document which has in fact been signed by the proper person and the Land Titles Act provides that the court may authorize registration of an instrument which has not been properly attested. (3)

## **REGISTRATION PROCEDURE**

### **1. Documents Not Requiring A Witness And An Affidavit of Attestation**

- a) a grant from the Crown
- b) an order in council
- c) a regulation filed under the Regulations Act
- d) a notification referred to in section 29 of the Land Titles Act
- e) an instrument under the seal of a corporation
- f) a caveat
- g) an order of a court or judge
- h) an execution
- i) a certificate of a judicial proceeding attested as such
- j) an instrument executed by a Minister of the Crown in the right of Alberta or by a person authorized by him to execute the instrument
- k) an instrument, including an instrument executed before the coming into force of section 159 (i.e., prior to June 6, 1983), that is provided for under another Act or a regulation and that does not under that Act or regulation require a witness to the instrument (e.g., builders' lien). (4)

2. **Ineligible Witnesses** - Neither a person who is a party to an instrument nor a spouse who consents to the instrument pursuant to the Dower Act may be a witness. (5) A relative, including a spouse, is not disqualified from being a witness provided he or she is neither a party to the instrument nor has a dower interest. The person acting as witness or commissioner for oaths in any of the required affidavits is not a party to the instrument.

### **3. Affidavit (FORM 31) Requirements (6)**

- a) A full given name is required for the witness. If only initials are given at the beginning of the affidavit but the signature discloses a legible given name, it is not

necessary to reject. Also, the requirement for a full given name can be waived if the witness is sufficiently identified such that he could be located in the future (e.g., the full name of an Alberta lawyer could be ascertained from the Law Society's records).

b) The names of the parties in the affidavit need not be identical to the names in the instrument but must be consistent so that it is apparent that they are the same person.

c) The jurat must state the date when and the place where the affidavit is taken. If only the month and year are completed for the date, it is not necessary to reject for this reason alone. An affidavit which is affirmed or is sworn to by a person who is illiterate or blind or does not understand the English language must have an appropriately modified jurat, as set out in the "[Information and Instructions for Notaries Public](#)" or "[Information and Instructions for Commissioners for Oaths](#)" booklets.

d) Any corrections in the body of the affidavit or jurat must be initialled by the person before whom the affidavit is sworn.

e) **Person Before Whom Affidavit May Be Made**

- Registrar
- Deputy Registrar or Assistant Deputy Registrar
- notary public for Alberta
- a judge of the Provincial Court, Court of Queen's Bench or Court of Appeal (includes a master in chambers appointed under the Court of Queen's Bench Act)
- a lawyer (a member of the Law Society of Alberta, other than an honorary member, who has not been suspended or disbarred)
- a metis settlement councillor as defined in the Metis Settlement Act
- a minister determined under section 16 of the Government Organization Act as the Minister responsible for the Notaries and Commissioners Act
- a municipal councillor within the meaning of the Municipal Government Act
- a political representative (includes a member of the Legislative Assembly of Alberta, a member from Alberta of the House of Commons of Canada, or a member of the Senate of Canada who at the time of appointment as a senator is a resident of Alberta)
- a student-at-law (registered under The Legal Profession Act whose registration has not been suspended or terminated)
- commissioner for oaths in and for Alberta
- a member of a board of trustees of a school district or division as defined in the School Act
- a full-time commissioned officer in the Canadian Forces, whether in Canada or outside Canada
- police officer as defined in the Police Act
- justice of the peace as defined in the Justice of the Peace Act

f) A notary public, Lawyer or Student-at-Law who provides his or her services as a notary public shall place his or her seal to each document which must contain the notary public's name and the words "Notary Public" and "Province of Alberta". A notary public is required to legibly print or stamp his or her name, expiry date or, in applicable cases, his or her office or status that applies. (7)

g) A commissioner for oaths in and for Alberta, Lawyer or Student-at-Law who provides his or her services as a commissioner for oaths is required to legibly print or stamp below his or her signature the words "A Commissioner for Oaths in and for Alberta", his or her name, expiry date or, in applicable cases, his or her office or status that applies. (8)

4. **Person Before Whom Affidavit May Not Be Made** - The Registrar is not required to register an instrument or a caveat if the person who acted as a commissioner for oaths or notary public in respect of that instrument or caveat is either a party to it or a spouse who consented to it pursuant to the Dower Act. (9)

5. **Defective Attestation** - The court may authorize the registration of an instrument notwithstanding that the proof of the execution may be absent or defective. (10) This will normally be done by a Fiat endorsed on the instrument. If it is by way of separate order, attach the order to the instrument. Fiat re: attestation does not require section 191 compliance.

6. **Marksman Affidavit** - If the person making the affidavit or statutory declaration is blind or illiterate, you must read the document, or cause it to be read, to the person and then ask the person if he understood what was read to him. You may only administer the oath, affirmation or solemn declaration if you are satisfied that the person has in fact understood what was read to him. In those cases, the ordinary form of jurat must be amended (see [Information and Instruction links in 3\(c\) above](#)) by inserting the following before your signature:

"As (name of person) is blind (or illiterate)

- a) this affidavit (or statutory declaration) was read to him in my presence,
- b) he seemed perfectly to understand it, and
- c) he made his signature (or mark) in my presence."

## STATUTE AND CASE REFERENCES

Statute references are to the Land Titles Act, R.S.A. 2000, c. L-4, unless otherwise indicated.

1. "Instrument" is defined in s. 1(k) to mean:
  - (i) a grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or exemplification of will, letters of administration or an exemplification thereof, mortgage or encumbrance,
  - (ii) a judgment or order of a court,
  - (iii) an application under section 75, or
  - (iv) any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title thereto.
2. s. 155 and Form 31, Alberta Regulation 480/81
3. s. 160 and 162

4. s. 159
5. s. 157; This section codifies the law as established in such a case as *Hebb v. Registrar of Titles*, [1983] 3 W.W.R. 48 (N.W.T.S.C.).
6. s. 210(3); Rules 298 - 314 of the Alberta Rules of Court outline the requirements for affidavits
7. s. 5, Notaries and Commissioners Act, R.S.A. 2013, c. N-5.5
8. s. 17, Notaries and Commissioners Act, R.S.A. 2013, c. N-5.5
9. s. 158
10. s. 162 and *Barty v. Kerr and the Registrar N.A.L.R.D.* (1975), 8 Alta., L.R. 275 (Alta. D.C.)