

## **PLANNING FOR INCAPACITY**

The loss of the ability to handle our affairs is a prospect that most of us would rather not think about. Until we are confronted with the realization that a family member or friend is slowly losing their ability to make decisions, many of us have never contemplated our own incapacity, nor had reason to learn of the legal consequences of mental incapacity.

Mental incapacity is a fact of life for many Canadians of all ages, and is unfortunately on the increase. The increasing longevity of the North American population has resulted in an increasing number of individuals being diagnosed as suffering from some form of chronic or degenerative disease with which is associated a dementia. Industrial or other accidents cause otherwise healthy young people to become mentally incapacitated. It is possible to plan for such incapacity through documents known as an "Enduring Power of Attorney" and a "Personal Directive".

### **Enduring Power of Attorney**

Many readers will be familiar with a "power of attorney", and may presently be assisting an aging parent or friend through such a document. With a power of attorney one person gives written authority to another individual to stand in their place for certain purposes. The person acting on your behalf is referred to as "the attorney". The word attorney in this context means a person who has been granted the power to act on your behalf pursuant to a Power of Attorney. It does not mean the attorney must be a lawyer. The person who gives a power of attorney is referred to as the "donor". The scope of the power of attorney given depends on the wording of the power of attorney. In some circumstances, it is desirable that the person acting on your behalf be given the power to lawfully do anything that you could have done with your property. In other circumstances, it may be desirable that the attorney only have limited power such as the power to deal with a specific asset such as a particular parcel of real estate or a bank account. This type of limited arrangement is convenient for an individual who, for example, has trouble physically getting to the bank.

The catch here, one that most people are unaware of, is that a non-enduring power of attorney is only legally valid so long as the donor of the power of attorney is alive and mentally competent. If the person in the above example should come to encounter not only physical difficulties in getting to the bank, but also lose their ability to make decisions about their banking, the power of attorney which was effective earlier is suddenly not worth the paper it is written on - it is void. An attorney who continues to act under an invalid power of attorney can in some cases, be held personally responsible for their actions.

The above scenario outlines the problems surrounding the "traditional" powers of attorney. These documents are useless on incapacity. At the very moment at which a power of attorney may be most needed, the traditional power of attorney is of no assistance.

An Enduring Power of Attorney, however, gets around this problem, as it endures through incapacity. With an Enduring Power of Attorney, we can specify who we wish to manage our affairs in the event that we lose our ability to do so in the future. Also, if desired, we can specify just how we may want certain things handled. The power granted by any power of attorney ceases with the death of either the person granting the power or the attorney and is therefore not a substitute for a proper Will. It is crucial that the Enduring Power of Attorney be signed before the person loses his mental capacity. A person who lacks mental capacity cannot sign a valid Enduring Power of Attorney.

While an Enduring Power of Attorney is executed with an eye to the future, it can also be used to grant a power of attorney in the present. The important thing is that it specifically contemplates future incapacity and states that if the individual should lose the ability to handle their affairs, it is their intention that the power of attorney should continue in effect. Alternatively, and as will usually be the case, a person who has absolutely no need of an Enduring Power of Attorney at present may execute an Enduring Power of Attorney which will only spring into effect on the occasion of their loss of mental capacity. If such a person was fortunate enough during their lifetime to never lose their ability to handle their affairs, the Enduring Power of Attorney would never be used. These latter form powers of attorney are the most common, as they provide an attractive planning tool to people who are currently in sound health and mind, especially when compared to the alternatives available.

Some readers may be familiar with the terms "trusteeship" and "dependent adult" which are used to describe roles under the *Dependent Adults Act*. The *Dependent Adults Act* provides a method whereby a person can acquire lawful authority to act on behalf of an adult whom had become incapable of making reasonable judgments. If a person does not have an Enduring Power of Attorney then a court application, pursuant to the *Dependent Adults Act*, is the only option.

Applications under the *Dependent Adults Act* occur "after the fact", meaning that someone is appointed to act on your behalf only after a doctor and the Court have determined that you have lost your ability to make reasonable judgments. The "dependent adult" therefore does not play any role in deciding who will act on their behalf. Not only is the proposition of being a passive player under such circumstances unattractive, but the unpleasantness of having to go before a Court and seeks a Judge's determination that a loved one has lost their ability to make reasonable judgements is overwhelming for many families. Such applications usually involve retaining a lawyer to make the

necessary application, and also involve going back to the courts every few years for review of the appointment, filing of the accounts of the trustee, and with each application, additional legal fees and inconvenience. While it is recommended that you meet with a lawyer to execute an Enduring Power of Attorney, it is likely only going to require one visit to put into place a document which can last a lifetime.

While the prospect of someone else making decisions for us and looking after our affairs may not be an attractive one, it may nonetheless one day become a cruel reality. Enduring powers of attorney provide a method whereby we can actually control part of our future, in that we can make sure that our affairs will be looked after by those we trust, and in the manner that we wish them to be looked after, in the event that we should during our lifetime lose our ability to do so ourselves.

Finally, to assist you in understanding what an Enduring Power of Attorney is, and what it can do, I have prepared and attached a schedule to this memorandum that highlights some of the issues that you should be aware of as they relate to Enduring Powers of Attorney.

### Personal Directive

An Enduring Power of Attorney protects your property and financial interests in the event that you become incapable of managing your affairs. Similarly, a Personal Directive can be of assistance to you in the event that you lose your ability to make decisions regarding your health and personal care matters.

You can, with a Personal Directive, appoint someone who can step in to make medical or personal care decisions for you in the event that you are no longer capable to do so for yourself.

Without a Personal Directive, your loved ones may have to make an application to the courts for a Guardianship Order before they can make health and personal care decisions for you. Furthermore, without a Personal Directive in place, you have not formally indicated what your specific health and personal care wishes are. This compels your loved ones to second guess your wishes which would certainly place a burden upon them.

You may have heard about a "Living Will". A Living Will is not the same as a Last Will and Testament, a Living Will addresses a situation where the following factors exist:

- a) A person suffers from an illness or an injury which causes extreme physical or mental disability;
- b) The doctors believe that there is no reasonable expectation of that persons recovery.

In contemplation of such circumstances, a person may express the wish that he or she not be kept alive by medication, artificial means, or "heroic measures".

The Living Will is one component of a Personal Directive in the Province of Alberta. A court appointed "guardian" will have the authority to make personal and medical decisions on behalf of a dependent adult, however, they will not have any authority to make "end of life decisions" that are normally contemplated under a Living Will.

I have prepared and attached a schedule that highlights some of the issues you should be aware of as they relate to Personal Directives.

Schedule  
Enduring Powers of Attorney

1. Your Last Will and Testament and Enduring Power of Attorney are separate and distinct documents. One does not replace the other, but you are certainly allowed to appoint the same person in both documents. Your Will only takes effect upon your death and your Enduring Power of Attorney is only effective during your lifetime and terminates upon your death.
2. Your Enduring Power of Attorney and your Personal Directive are also separate and distinct documents. The Enduring Power of Attorney confers authority upon your "Attorney" to manage your financial affairs even if you lose capacity to manage those affairs for yourself. Alternatively, your Personal Directive confers authority upon your "Agent" to make personal and medical decisions on your behalf only in the event that you lose mental capacity to make those decisions for yourself.
3. Your Enduring Power of Attorney can appoint one, or more, persons who can act on your behalf. If you appoint only one person you should consider a back-up, or alternate, to the person you are appointing so that someone will be able to look after your financial affairs in the event that your primary appointee dies or becomes incapable or unwilling to act.
4. The Power of Attorney that you may have signed at your bank or financial institution for banking purposes is not the same as an Enduring Power of Attorney. The bank Power of Attorney may be acceptable for banking purposes but a bank Power of Attorney will likely not endure beyond your loss of capacity and it is limited to the assets that you hold with that bank.
5. Enduring Powers of Attorney are not only for seniors. Even if you are in your twenties, and in excellent health, you may unexpectedly lose your mental capacity because of a motor vehicle accident or sports accident.
6. It is imperative that you appoint someone whom you completely trust to represent you under an Enduring Power of Attorney. If you do not trust that person, do not appoint him or her. An Enduring Power of Attorney is a very powerful document and the last thing you want is for the person you appoint to take advantage of you. In the event that there is no family member or close friend that you trust to represent you, you might consider speaking to a representative of a trust company. You should recognize, however, that you will have to consider their requirements for compensation in order to carry out this function on your behalf.
7. There is a very onerous duty imposed upon the person you name as your Attorney. That person must act in good faith on your behalf and must always put your interests first and foremost. It is best to speak to such person ahead of time. The person you are appointing does not necessarily have to accept their appointment.
8. Both husband and wife should have their own Enduring Power of Attorney. It is not appropriate to rely upon one document to carry out this function for both spouses.
9. A marriage license confers no authority on a spouse to act if their husband or wife should become incapable.

Schedule  
Personal Directives

1. With a Personal Directive you can ensure that someone you trust has the right to step in and make health and personal care decisions for you in the event that you become incapable of making those decisions for yourself.
2. A Personal Directive is a separate and distinct document from an Enduring Power of Attorney.
3. You are allowed to appoint the same person to represent you in both your Enduring Power of Attorney and Personal Directive.
4. The person you appoint under your Personal Directive will have the authority to be your spokesperson, sometimes known as a patient advocate. You should pick an Agent whom you feel is most dedicated to you and will be the most likely to carry out your wishes. It is not an easy job, so do not think that you are hurting someone's feelings by not appointing him or her. You should speak with all of your children and find out whether they want the position as Agent. Remember that the person or persons you appoint cannot be compelled to act for you so you should make sure that whoever you appoint will act for you.
5. In situations where a couple is residing together it is important that each of them has his or her own Personal Directive.
6. It is recommended that you speak to your doctor before preparing a Personal Directive. Your doctor should be provided with a copy of your Personal Directive to keep with your medical records.
7. A Personal Directive will usually alleviate what your family will go through in instructing the doctor, in the event that your situation is so severe that there is no reasonable expectation that you will recover. It is recommended that you also discuss these matters with your loved ones.
8. A Personal Directive can be revoked at any time as long as you have capacity. It is also recommended that you review your Personal Directive from time to time.
9. A Personal Directive that cannot be found is of no use. You should make sure that people know where to find your Personal Directive.