POWERS OF ATTORNEY
IN ONTARIO

A power of attorney is a legal document in which you appoint the person of your choice to act as your representative in the event that you are unable to represent yourself or unable to make your own decisions. The types of decisions covered by a power of attorney fall into two categories. Property decisions cover all the different financial decisions you might be required to make such as bank deposits, paying bills, investments, buying, selling, or refinancing a home, filing income tax, etc. Personal care is defined in the *Substitute Decisions Act* and includes any decisions about health care, shelter, clothing, nutrition, hygiene, and safety. The person that you appoint as your representative in a power of attorney is called an "attorney". When used this way, the word "attorney" does not mean a lawyer.

In Ontario, there are three different types of powers of attorney, two for property and one for personal care. These include:

A **General Power of Attorney for Property** has its authority in the *Power of Attorney Act*. This power of attorney for property is used if a mentally capable person wants to appoint someone to act on their behalf for a specific period of time or for a specific task. A General Power of Attorney ends if the person who gave it becomes mentally incapable.

A **Continuing Power of Attorney for Property** has its authority in the *Substitute Decisions Act*. A mentally capable person can appoint someone to act on their behalf while they are mentally capable and/or to act on their behalf in the event of mental incapacity.

A **Power of Attorney for Personal Care** also has its authority in the *Substitute Decisions Act*. This power of attorney enables you to appoint an attorney for personal care to make decisions for you if you ever become incapable of making your own personal care decisions. It is **only** effective if the person who makes it becomes mentally incapable of personal care decision making.

The nature of property and personal care decisions is very different and the legal rules for managing property or making personal care decisions are also very different. Therefore, it is necessary to have two separate powers of attorney to cover both property and personal care.

Mental incapacity can happen to any of us, at any age. It can happen suddenly if a person has a stroke or is in an accident, or it can happen gradually if a person has a disease like Alzheimers. If you haven't appointed an attorney to act as your representative and you become mentally incapable, there is a good chance that the Public Guardian and Trustee will become involved with the management of your finances. It can cost thousands of dollars to change this once it happens. If you became mentally incapable, who would

make decisions for you and how would they know what you would decide? Appointing an attorney now is wise and it is cost effective insurance for the future.

THE POWER OF AN ATTORNEY FOR PROPERTY

The person that you appoint in a power of attorney is called an "attorney". It means someone who acts as your representative according to the instructions you have given them. The *Substitute Decisions Act*, which became law in 1995, provides a clear description of the role of an attorney who has been appointed in a power of attorney. Unfortunately, our understanding of the role that an attorney plays in the life of the person who has appointed them is not well understood.

Before the *Substitute Decisions Act*, if a person's ability to make their own decisions was questioned, a judge would review their case and find them to be either competent or incompetent. If the court found someone to be incompetent, that person lost **all** of their decision making rights.

Mental capacity/incapacity is defined by the law in a different way now. It is

- the ability to understand information that is relevant to a decision, and
- the ability to understand the consequences of making or not making a decision.

Mental capacity is now determined in relation to specific decisions. So a person may be capable of making some decisions, but incapable of making other decisions. The role of the attorney is to encourage the person to make whatever decisions he or she is capable of making and keep them as informed as possible regarding their financial affairs. The attorney only intervenes where the person is mentally incapable of a particular decision.

The duties of an attorney for property are listed in section 32 of the *Substitute Decisions Act* as follows:

- to perform their duties with honesty and integrity and in good faith for the incapable person's benefit;
- to explain to the incapable person what the duties of the attorney are;
- to encourage the incapable person to participate in decision making about their property to the best of their ability;
- to promote regular personal contact with the person's family and friends;
- to periodically consult with supportive family, friends and those who provide care to the incapable person; and
- to keep account of all transactions concerning the incapable person.

Many attorneys believe that a power of attorney gives them full authority over the grantor's property and that they are not required to involve the grantor once they begin to act. According to section 42 of the *Substitute Decisions Act* the court has the authority to review the attorney's accounts and actions and can remove the attorney if he or she is not fulfilling the duties outlined in Section 32 (above). An attorney appointed in a Continuing Power of Attorney for Property must always act in the best interests of the person who gave them this authority.

CONTINUING POWER OF ATTORNEY FOR PROPERTY CAN I LIVE WITHOUT IT?

The most important reason for making a **Continuing Power of Attorney for Property** is to ensure that the person you would choose to manage your finances has the authority to do so if help is ever needed. The Executor that you appoint in your Will only has authority to manage your estate **after you have died**. The person that you appoint in a power of attorney for property only has the authority to help you manage your finances **while you are living.**

The attorney or representative that you appoint in a power of attorney for property must be someone that you trust and who has the skills to manage finances responsibly. While you are mentally capable, you can appoint anyone to act as your attorney. If you are ever assessed and found to be mentally incapable and don't have an attorney, the Public Guardian and Trustee may become your Statutory Guardian. The Public Guardian can only transfer this authority back to family and they will make every effort to do so. If this happens, it can cost family members thousands of dollars in lawyer fees and court costs.

Many people think that their spouse can automatically take over for them if they become mentally incapable. This is not true unless you have given your spouse power of attorney. Many people also believe that a joint bank account can act as a substitute for a power of attorney. They believe that if something happens to them the other person on the joint account will look after them and pay their bills. **This is only true if you have given power of attorney to the other person on the joint account.** If the bank is aware that one of the joint owners of the account is mentally incapable of managing their finances, the bank will freeze the account. The bank's job is to protect the assets of its customers. They have no way of knowing why the account was opened or the relationship of the people with signing authority. Joint accounts are an easy way to pass assets to another person outside of your estate when you die, but if you are living and become mentally incapable, a joint bank account may cause financial disaster.

Besides making deposits and withdrawals and paying bills, there are many other financial transactions in our lives. Things such as making investments, selling assets, running a business, and filing a tax return can only be done on your behalf when you have appointed an attorney in a Continuing Power of Attorney for Property. The *Family Law*

Act refers to the home which is shared by two spouses as the "matrimonial home". According to this law, the signatures of both spouses are required to sell or refinance the matrimonial home, regardless of whether one or both of the spouses owns it. There are all kinds of situations where a signature is required to finalize a financial transaction.

Mental incapacity can happen to anyone at any age. Who would manage your finances if you became mentally incapable? Can you live without a Continuing Power of Attorney for Property? Yes, you can. The question is, "Why would you want to, given the potential problems and costs associated with needing one and not having it?"

BANKS AND POWERS OF ATTORNEY

In Ontario, there are two different types of powers of attorney that pertain to property (finances). A **General Power of Attorney for Property** has its authority in the *Power of Attorneys Act*. This power of attorney for property is used if a mentally capable person wants to appoint someone to act on their behalf, but the authority ends if the person who gave it becomes mentally incapable.

A **Continuing Power of Attorney for Property** has its authority in the *Substitute Decisions Act*. In this document a mentally capable person can appoint someone to act on their behalf while they are mentally capable and/or to act on their behalf in the event of mental incapacity.

Either of these types of powers of attorney can be written to cover all financial matters or they can be written with restrictions. Restrictions may limit use of the power of attorney to a specific period of time or for a specific task. In the course of doing business at your bank you may be asked to sign a power of attorney form which has been prepared by the bank for use with its customers. If the banks asks you to sign one of their power of attorneys, there are several questions you should ask:

Is the power of attorney ""General" or "Continuing"?
Is it restricted to financial transactions at that particular bank? If yes, what transactions are covered by the power of attorney?

If you have already prepared a Continuing Power of Attorney for Property which has no conditions or restrictions, that document covers banking transactions. The bank may ask you to sign "their form", but this is not necessary. It is important to note that the *Substitute Decisions Act* states that, "a new continuing power of attorney is terminated when the grantor executes (signs) a new continuing power of attorney unless the grantor provides that there shall be multiple continuing powers of attorney". In other words, signing an additional power of attorney form at the bank, which is restricted to transactions at a bank, may have the effect of terminating a previously signed power of attorney without restrictions, which was intended to cover all areas of your finances. It would only be necessary to sign an additional power of attorney form if you were

appointing a different attorney for another purpose, e.g. appointing the bank as your attorney for the specific purpose of transferring bonds or securities.

If you, as the grantor of the power of attorney, are mentally capable, banks can be quite insistent that you must also sign their form. From the bank's perspective, the signing of a power of attorney form that has been prepared by their head office and for their use is their way of protecting the customer. They ensure that the person giving power of attorney is mentally capable of doing so and that the person being named as your attorney is indeed the person that you want to represent you. In doing this they are also protecting themselves.

If you become mentally incapable, obviously the bank will find it necessary to use the power of attorney document prepared by someone other than the bank staff. The attorney's "power" or authority to act is in the document and the provision of a signed power of attorney document should be all that's required for your attorney (representative) to act on your behalf. Very often the attorney (representative) can be frustrated by the bank's request for more information and verification that the grantor is incapable. From a legal perspective this is not necessary, but from a business perspective it's good practice. Again, the bank is acting to protect the interests of their customer, and of course, to protect their own liability.

As you age and anticipate that the person you've appointed in a power of attorney may begin acting on your behalf, it is helpful to have this person accompany you to the bank to meet the manager and staff. This can be very helpful for both your attorney and the bank, and can make for a smooth transition if and when it is necessary for your attorney to act on your behalf.

POWER OF ATTORNEY FOR PERSONAL CARE AND LIVING WILLS WHAT'S THE DIFFERENCE?

Living Wills became popular in the 1980's when people were becoming more aware of the fact that they had a right to be informed about medical diagnoses, a right to be informed about treatment options and, above all, a right to give consent to treatment. The 1980's also marked the beginning of a period in which rapidly changing medical technology had the power to save and extend life more than ever before. Cardiopulmonary resuscitation (CPR), transfusions, and intravenous fluids all became routine practice in hospital emergency rooms and this was the context in which people began to write Living Wills or Advance Health Directives, as they are also called. In these documents, people write down what their wishes and/or instructions regarding medical treatment would be in the event that they were incapable of making a treatment decision and had to depend on others to make decisions for them.

Before the enactment of the *Substitute Decisions Act* in 1995, a Living Will or Advance Health Directive had no legal authority. In other words, there was no law or legal requirement for anyone to follow what another person had written in a Living Will. Health care professionals and family usually felt a moral obligation to follow the

instructions of a Living Will. The *Substitute Decisions Act* and the *Health Care Consent Act* have now changed this. These new laws give legal authority to the instructions which are written in a Living Will and anyone making decisions for an incapable person has a legal obligation to follow the wishes and instructions of the person who gave the instructions. So the law doesn't recognize a Living Will as a legal document, but rather, it is the instructions that are contained in it that have legal authority.

A Power of Attorney for Personal Care is a legal document in which an individual gives another person the authority to make personal care decisions on their behalf if they become incapable of making personal care decisions. Its authority comes from the *Substitute Decisions Act*. A Power of Attorney for Personal Care can be written with or without instructions. The important focus of the document is the appointment of the person whom you would choose to make personal care decisions for you.

Whether your instructions about health care and medical treatment are verbal, written in a separate document (Living Will) or included in a Power of Attorney for Personal Care, the legal obligation for people making decisions on your behalf, is always the same. Also, it is the most recently expressed instructions/wishes given by you while mentally capable that must be followed. That means you could have an old Living Will with written instructions, but if you gave new verbal instructions at the breakfast table this morning, those are the instructions that the law says must be followed. Instructions can be as changing as the people who make them and instructions may not cover every situation. Before you think too much about instructions, make sure that the person, whom you would choose, has the legal authority to act on your behalf if and when you need them.

APPOINTING AN ATTORNEY FOR PERSONAL CARE

The authority to appoint an attorney for personal care in a Power of Attorney for Personal Care, comes from the *Substitute Decisions Act*, 1995. People have been able to appoint someone in a power of attorney for property for many years, but the Power of Attorney for Personal Care is a new and different type of power of attorney. The *Substitute Decisions Act* defines "personal care" and says that it includes decisions regarding health care, nutrition, clothing, shelter, hygiene and safety. This is different from most Living Wills (discussed in the above article) which tend to focus on medical/health care instructions and may not include these other areas of personal care. When selecting an attorney for personal care, it is important to choose someone to whom you are close; someone who understands your beliefs and values with respect to life and health.

Many of the decisions that an attorney for personal care may be asked to make on your behalf will probably be medical or health related decisions. Because of this and because most people still haven't appointed an attorney for personal care, the *Health Care Consent Act*, 1996, provides what is called a list of "Substitute Decision Makers" (section 20, *Health Care Consent Act*). Any health practitioner who is proposing a treatment for you must obtain your consent. If you are mentally incapable of giving consent and haven't appointed an attorney for personal care, then the health practitioner looks to the

list of substitute decision makers for someone who can give consent on your behalf. The list is given in order of authority. In other words, a substitute decision maker is selected because there is no one else above them on the list with greater authority:

- the incapable person's guardian of the person
- the incapable person's attorney for personal care
- the incapable person's representative appointed by the Consent and Capacity Board
- the incapable person's spouse or partner
- a parent or child of the incapable person
- a parent of an incapable person who has only a right of access
- a brother or sister of the incapable person
- any other relative of the capable person

When is it important to appoint an attorney for personal care?

If the person whom you would choose to act on your behalf is not the person that the law designates on the above list of substitute decision makers, it is important for you to appoint an attorney for personal care in a Power of Attorney for Personal Care.

If there are two or more persons in any of the above groups who qualify to be substitute decision makers, who rank ahead of any others and who disagree about whether to give or refuse consent, the Public Guardian and Trustee shall make the decision in their place. Therefore, it is important to appoint an attorney for personal care who will follow your instructions, where there is a group of substitute decision makers who may disagree about decisions on your behalf.

If you have been diagnosed with a terminal illness or condition and have specific thoughts about your treatment and care as the condition progresses, it is important to appoint an attorney for personal care and ensure that this person understands your wishes and instructions.

We hope you found this information helpful.

If you have any questions and/or you would like to discuss estate planning and/or preparation of a Last Will and Testament and/or Powers of Attorney, please contact us and we will be happy to assist you. You should also be aware that your legal fees with respect to estate planning are tax deductible.

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