



Wills, Powers of Attorney and Health Care Directives

Presentation by Name Ann Whiteway Brown

April 28, 2018

Disclaimer

None of the content of these materials or the presentation thereof is or should be construed as tax, legal, financial or other advice, and attendees should review each client's particular situation individually. We disclaim any liability to anyone arising from reliance on any of the contents hereof.

Wills, Powers of Attorney & Health Care Directives

- I. Introduction
- II. Powers of Attorney and Health Care Directive
 - A. Property and Financial
 - B. Personal Care
 - C. Health Care Directive
- III. Wills and Estate Matters
 - A. The Basics
 - B. Estate Planning / Will Drafting
 - C. Estate Administration

I. Introduction

- ▶ Every few years, statistics released by different groups confirm that Canadians are not prepared to deal with the lack of wellness and death:
 - 71 per cent of Canadian adults do not have a signed power of attorney (*LawPro 2012*)
 - 51 per cent of Canadian adults do not have a signed Will and only one-third (35%) have one that is up to date. (*Angus Reid Institute 2018*)

This presentation will focus on the estate planning process as it relates to preparing a Will, Powers of Attorney and Health Care Directive in New Brunswick.

Power of Attorney

► Why is a Power of Attorney a useful document?

If you are in an accident, fall, suffer a stroke, or are diagnosed with dementia, you may need someone to assist you with all the activities of daily life.

- A **Power of Attorney** is a document under seal, appointing someone to act in your name for you, **only while you are alive**, either to do specific acts or to act for you generally. It must be under seal, dated, signed and witnessed by an independent adult.

There are two kinds. They can be in separate documents or they can be included in the same document. You can name different people for each kind or the same persons for both.

► **Property and Financial Matters - *Property Act***

- Real Estate, Financial Institutions, Banking, Investments, Business, Insurance, Governmental Departments and Agencies, Taxes, Pensions, Employers, Telecommunication and Energy Companies

► **Personal Care - *Infirm Persons Act***

- Housing, Nutrition, Clothing, Hygiene, Social and Safety and Health (Overlap with Health Care Directive)

Power of Attorney

Definitions

- **Donor, Principal or Maker** (You - adult person)
- **Donee, Attorney, Substitute Decision-Maker or Proxy** - a trusted, adult, competent, available person to step into the shoes of the Donor, make decisions on their behalf and act in their best interest.

Because an Attorney has the power to alter the legal or personal position of the Donor, this is a special relationship of trust. The Attorney:

- Must use reasonable care in acting;
- Must account as required;
- Must not allow personal interests conflict with the donor;
- Must not obtain secret profits;
- Must not change testamentary obligations;
- Cannot delegate responsibility to another (without specific permission).

Power of Attorney - Legal Capacity

Capacity to Make a Power of Attorney

- ▶ Mental disorder does not equate with incapacity. An early diagnosis of dementia may not be too late. A person may be incapable of managing property but capable of making a Power of Attorney for property.
- ▶ The threshold for Powers of Attorney for personal care is lower than for property, which may be lower than testamentary capacity.
- ▶ **General principle:** Common law - a person's ability to understand all the information relevant to the decision to be made and their ability to understand the possible implications of the decision in question.

Power of Attorney - When is a Power of Attorney effective?

- ▶ **Property** - IMMEDIATELY after signing, although some provinces have springing POAs.

Since 1987, the Property Act permits a Power of Attorney to continue in effect during periods of mental incompetence, (contrary to the common law) but only if specific authorization is included, for example:

“Enduring

I expressly authorize and direct my Attorney to exercise all or any of these powers during any period of mental incompetence that I may suffer, and in particular in accordance with the provisions of section 58.2 of the *Property Act*, c. P-19, R.S.N.B. 1973 and any amendments thereto.”

- ▶ The Donor can and should take steps to limit the usage of their Power of Attorney, i.e. by having a third party hold it (in trust) using a Letter of Authorization setting out how to activate the Power of Attorney; by written authorization, agreement of family members, medical opinion or capacity assessment. For confidentiality and privacy reasons, the letter should also authorize all medical personnel to release information to the prospective Attorneys.
- ▶ **Personal Care** - Only when Donor becomes unable to manage their personal care.

Power of Attorney - Contents

- ▶ You must name one or more Attorneys to act for you - Choose a trustworthy person who knows and will carry out your affairs as you would. It is desirable that they have some form of training, experience and ability to organize and deal with others. Strongly recommend naming an alternative or substitute. You may name Public Trustee if no other alternative.
- ▶ Be careful if your Attorney resides, works or is a US or UK citizen. Naming them as a sole Attorney may lead to investment regulatory or tax complications.
- ▶ If more than one person, set a method for decision-making, i.e. unanimous = joint, majority, independent = several.

Power of Attorney - Contents

Optional clauses:

- Consultation and Decision-making clause
- Advance Care Plans and Health Care Treatments
- Housing preferences
- Taking care of dependents
- Gifts to others, i.e. reasonable holiday or special occasions
- Digital Assets
- Compensation and Expenses
- Accounting and Reporting, Monitoring

Power of Attorney - Duties of an Attorney

- Maintain a record of the persons and institutions that copies have been given to and all dealings with those persons
- Make an inventory of all property, accounts and information
- Secure property, notify all those required, insurers, government, taxes
- Follow specific instructions in Power of Attorney
- Encourage participation to extent possible
- Communicate and consult with persons as required
- Expenditures reasonably required considering their circumstances
- Act honestly, reasonably, diligently and in good faith and in Donor's best interest

Health Care Directive

A. The Basics - Health care treatment decisions - *Advance Health Care Directives Act*

- ▶ In December 2016, the ***Advance Health Care Directives Act*** was enacted which deals with consenting to, refusing or withdrawing consent to health care treatment when you are not able (in the opinion of two health care professionals) to make or communicate your decisions respecting a proposed treatment.
- ▶ For all ages and stages - not just end-of life health care treatment - more that DNAR
- ▶ Overlaps with Power of Attorney for Personal Care - should not conflict
- ▶ You may name one proxy at a time to make decisions, or you do not have to specify a Proxy, but can express in advance your specific decisions and instructions regarding health care treatments, identify persons to be notified when the directive comes into effect and include a general statement of your values, beliefs and wishes. These are often referred to as Living Will statements.
- ▶ The Health Care Directive must be dated and signed in the presence of an independent adult witness. No lawyer is required.
- ▶ A health care professional who receives a Health Care Directive shall retain a copy in the Maker's file.

Health Care Directive

- ▶ 2 different options:
 - ▶ name a Proxy and one or more alternate backups to communicate your decisions, values, wishes; or
 - ▶ Do not name a Proxy, but instead set out your specific Health Care treatment decisions - those you want to have, or refuse or have withdrawn

Having a family discussion is not easy, but it can significantly reduce everyone's stress and worry in the middle of a medical crisis.

Think about outcomes - How you feel and what your life may be like after health care treatments are given to you is called an outcome of health care.

Do your research, talk to your doctor.

Be specific - preferable to "No heroic measures".

If not expressly written, everyone will be trying to determine what your wishes and values are and to act in your best interest.

Power of Attorney for Personal Care v. Health Care Directive

Power of Attorney for Personal Care	Health Care Directive
Can name two or more persons to make decisions and require consultation with others	Does not require naming a proxy at all
Whole person - Can integrate your health care decisions with your personal care issues, such as shelter, food, hygiene	Health care treatment focussed - health system does not need to review all your other personal arrangements
If health care is buried in document - who knows it is there and reads it	Instructions are enforceable
Current legislation is not comprehensive - no process or information on how to use	Has notification provisions if Health Care Directive is active - useful for certain family dynamics - multiple marriages
	Can be fairly easily updated and changed, though care should be taken that this is intentional

SUMMARY - Other Important Issues

- ▶ If you do both, and most people probably should, make sure they do not conflict, and hopefully are consistent
- ▶ Communicate your wishes to your Attorney and your loved ones;
- ▶ Make it easy for them to step into your shoes - Collect, organize and keep your important information updated
- ▶ Where to keep the original documents Power of Attorney and Health Care Directive? Balance access when needed with security - avoid fire, flood and theft
- ▶ Take your original Health Care Directive with you when you go to the doctor or the hospital - When you travel - put a card in your wallet
- ▶ **EMT Ambulances** - Health Care Directive - Doctors letter, Fridge Information

Estate Planning (Will Drafting)

In general:

- Make the best plan you can think of now and review it every few years.
- Think inter-generational.
- My preference is **clarity** combined with **flexibility**.
- If nothing else, name an executor, and an alternate and your main beneficiaries.
- Be careful if your executor resides, works or is a citizen of the US or UK.

Holograph Wills - all in your own handwriting, dated and signed

If TYPED, must have 2 independent witnesses and all must sign together (same with any changes to a Will)

WILL - Legal Capacity

Mental Capacity - The testator maker must know:

- Nature and effect of a Will
- Nature and extent of their assets
- What you are giving in the Will and how
- Which people might expected to benefit
- IF someone is not included, what claim they will make
- Not acting under any threat, undue influence or delusion

WILL - Lawyer's responsibility to know your client

- Benefit of a lawyer is to make your plan uniquely yours and effective and should provide practical, legal and tax advice - Income Tax and Probate Tax
- May ultimately be responsible to disappointed beneficiary
- Questionnaires and Checklists - Personal Information and Asset Ownership
- Interaction with other Financial Assets - Beneficiary Designations - RRSPs and RRIFs, Pension and Life Insurance.
- If you name your children, what happens if they predecease you, or on a tax deferred investment if you name a designated beneficiary who is not a residuary beneficiary (Beneficiary gets funds, Estate / other beneficiaries pay the tax).
- It can also be beneficial to designate charities as beneficiaries - full deduction to Estate.

WILL - Executor

Most important decision

- Executor / Trustee and alternate appointment
- Compensation, Expenses
- Bonding waivers and Liability

WILL - Clauses

- Personal Effects and Special Items
- Cash Bequests
- Residue - Main beneficiaries, secondary beneficiaries
- possible common disaster alternatives
- B Minors under 19 - Guardians - Trust considerations - Payments on behalf of minors
- What if a beneficiary is not competent?
- Funeral instructions for body (Should have pre-planned if not pre-paid)
- Digital Assets
- Family Property clauses
- Survivorship
- Alternative Dispute Resolution

WILL - Other Important Issues

- ▶ Once it is all put together, one method to determine if your plan is comprehensive is to mentally test it by considering what would happen if the inevitable happens:
 - ▶ Next year;
 - ▶ In 5 years time;
 - ▶ In 20+ years (long range) in the event you never get around to updating it.
 - ▶ Where to keep the original Will?
- ▶ Balance access when needed with security - avoid fire, flood and theft
- ▶ Most important steps to take - once procrastination is overcome:
 - ▶ Communicate your wishes to your Executor and your loved ones;
 - ▶ Make it easy for them to step into your shoes - Collect, organize and keep your important information updated

THANK YOU!