

PLANNING FOR INCAPACITY

Someone must stand in our shoes and conduct our affairs when we no longer have the capacity or the ability to do so. Although we may anticipate it, we cannot predict whether or not, or when, we may become mentally incompetent. How then can we plan to have our affairs conducted properly in the event of mental incapacity? The best starting point is to draft a Power of Attorney.

A “Continuing” or “Enduring” Power of Attorney for Property is a written authority to an appointed person (an “attorney”) to do certain specific acts in the name of the person granting the power (the “donor”). From an estate planning perspective, the purpose of a Power of Attorney for Property is to ensure that in the event of the legal incapacity of the donor, the attorney will have the authority to deal immediately with the incapacitated person’s assets.

Without a Power of Attorney for Property an interested person would be forced to make an application to the court to become the incapable person’s guardian. Until appointment as guardian, that person would have no authority to deal with the incapable person’s assets. This process can be time consuming and expensive. A Power of Attorney for Property with a clause indicating that it may be exercised during any subsequent legal incapacity on the part of the donor avoids the expense and frustration of a guardianship application. It will also preclude, as much as possible, involving any government or judicial authority.

The attorney does not have *carte blanche* authority over the donor’s assets. He or she becomes the donor’s agent and as such has *fiduciary* obligations with respect to that role. Misconduct and abuse are answerable to the court, and an appointed attorney will be personally liable for his or her misdeeds. Under the laws of most jurisdictions, the courts have power to intervene in cases of reported abuse.

In some jurisdictions, one can also draft a Power of Attorney for Personal Care in which an individual gives someone else the authority to make personal care decisions for them if they become incapable of making decisions on their own. Personal care includes decisions about health care, food, living arrangements or housing, clothing, cleanliness, and safety.

A Power of Attorney for Personal Care may give full authority or may limit that authority to certain areas. Among other things, a Power of Attorney for Personal Care can give an

attorney the authority to give or refuse consent to treatment on a mentally incompetent person's behalf.

A Power of Attorney for Personal Care may also include instructions to the attorney. For example, the person who gives the Power of Attorney may have strong feelings about where s/he wants to live or under what conditions s/he would consent to certain kinds of medical treatment. In this respect, it is like a Living Will, which is a document signed by a person directing that if s/he is terminally ill, is no longer able to express his or her wishes, and death is imminent, then life sustaining procedures should not be undertaken to artificially prolong life. Advance Directives are a type of Living Will, which tend to be more treatment-specific and are written in medical terms so that doctors can interpret them more effectively.

Living Wills and Advance Directives have recently commanded considerable public attention. As debilitating diseases such as AIDS and Alzheimer's increase, people are alarmed at the prospect of being kept alive by artificial life support systems when death is inevitable and they are incapable of exercising the right to refuse such treatment.

Without legislative authority, a patient cannot be certain that a Living Will or Advance Directive will be recognized. To complicate matters, family members are not always automatically granted the right to intervene and override the instructions of a doctor in the event of a patient's incapacity. This troublesome situation can be cured, however (where the laws of the applicable jurisdiction permit it), by requiring the physician to seek decisions from a legally authorized person, usually a family member, and requiring that authorized person to follow the incapable person's prior wishes in making those decisions. In some provinces, the scope of Living Wills and Advance Directives may be broad enough to include any type of instruction (i.e., regarding housing, food, etc.), even to the extent of recognizing oral expressions of wishes.

No adult should be without a Power of Attorney. If you do not have one, you should contact your professional advisor and make this part of your estate planning documents.