

## **Powers of Attorney – “It Could Happen to You” (or to your loved ones)**

As the “boomers” begin to realize their mortality, much more attention has been given to what has been generically termed “Living Wills”. This term stems from the fact that an actual Will only takes effect once the writer of the Will has died. A Will “speaks as of the date of death” and, until such time, it has no effect whatsoever as regards the management of your affairs. Thus, “Living Wills” were designed to govern your affairs in the event that you are alive but incapacitated to the extent that you are no longer mentally competent or are otherwise unable to communicate your wishes.

In Canada, there is no such thing as an actual “Living Will”. In Canada, provisions for such planning are covered by what is essentially a special type of Power of Attorney. Since the provincial jurisdiction regulates such documents, the actual terms (and names) of these documents vary from province to province. What makes these Powers of Attorney “special” is the fact that they are valid despite (or as a result of) the incapacity of the person who drafts them. A regular Power of Attorney (which is still commonly in use, primarily for business purposes) always ceases to have any effect if the person who granted it becomes incompetent. This is based on the premise that, with the grantor becoming incompetent, there is no method by which the regular Power of Attorney can be revoked nor can the actions of the “attorney” be reviewed. Thus, regular Powers of Attorney are automatically revoked.

Since it is very important to plan for a possible period of mental incapacity, the provinces have responded with legislation that provides the Canadian versions of “Living Wills”. Essentially, there are 2 types of documents that you can draft:

1. **Enduring Power of Attorney (for property).** An Enduring Power of Attorney (various provinces give them various names) is a document that you can prepare (while competent) which will allow you to decide who will control your financial affairs (property) in the event you become mentally incapacitated (i.e. dementia, coma, etc.). It also allows you to set out the guidelines or restrictions on that person’s authority. Such documents can be:
  - Immediate - in that they take effect upon signing and “endure” in the event that you become incapacitated for any period of time. Often, these are used by people who are perfectly competent mentally but, due to some physical limitation (reduced mobility or residence away from the jurisdiction), they prefer that somebody else also have the authority to sign documents on their behalf. If they become mentally incompetent, that authority continues in accordance with the instructions contained within the document.
  - Contingent or “Springing” – in that they **ONLY** take effect upon the mental incapacity of the grantor. Until such an event occurs, the document has no effect whatsoever.
2. **Power of Attorney for Personal Care:** Also known as an Advanced Health Care Directive, this is a document that you can prepare (while competent) which allows you to decide now who will control your personal and/or health care affairs in the event you become mentally incapacitated (i.e. dementia, coma, etc.) or become unable to communicate and it allows you to set out the guidelines for health care or restrictions on the named person’s authority.

If you’re wondering about the need for an Enduring Power of Attorney AND a Health Care Directive, simply ask yourself the following two questions:

1. If you're ever in the situation where you're unable to make decisions for yourself, who will? Would you rather have somebody you've chosen in advance or somebody appointed by the Courts? In the absence of such documents (prepared in advance while you're competent), somebody will have to apply to the courts to have the authority to act on your behalf. Your spouse or children or parents DO NOT automatically have the authority to act on your behalf. Confusion and stress are amplified in cases where several members of a family make such an application or where nobody applies. In either case, the "default" procedure set forth by the various provincial governments (which usually involves the appointment of "trustees" and "guardians" who must provide periodic and detailed reports) will minimize your input. And the government appointees will be restricted in their ability to continue your support of "Kingdom" work. And keep in mind that if your loved ones haven't prepared such documents, you could be one of the victims of this stress and confusion.
2. What guidelines would you like them to follow? If you have particular concerns regarding your residence or level of health care, you should prepare these documents and incorporate such concerns and instructions.

The rules regarding the proper preparation of these documents, the scope of authority that can be granted, the responsibilities of the person acting on your behalf and the supervision of that person vary according to provincial legislation. However, all such agreements must in writing, may allow for the granting of specific or limited authority and may allow for the appointment of more than one person to act on your behalf. While some provinces do not require that such documents be prepared by a lawyer, others limit the authority that a "non-lawyer-prepared" document can grant. And, since this is a document that can cause considerable confusion if not drafted properly, professional legal assistance is recommended.

The three basic issues that require consideration are:

- Who** Who is going to be "in the driver's seat" if you can no longer "drive your affairs" yourself?
- When** If the document is not to take effect immediately, you should specify how the determination of "incompetence" can be made (e.g. the "written opinion of two certified medical professionals").
- Where** Know your province's particular legislation! The rules vary significantly as to how the document is to be prepared and as to how the powers granted can be exercised.

<b>B.C.</b>	Representation Agreement for Property or Finances	and/or Health Care
<b>Alta.</b>	Enduring Power of Attorney	Personal Directive
<b>Sask.</b>	Enduring Power of Attorney	Health Care Directive
<b>Man.</b>	Springing Power of Attorney	Health Care Directive
<b>Ont.</b>	Continuing Power of Attorney for Property	Power of Attorney for Personal Care
<b>Que.</b>	Mandate Given in Anticipation of Incapacity	
<b>N.B.</b>	Power of Attorney	Power of Attorney for Personal Care
<b>N.S.</b>	Enduring Power of Attorney	Authorization to Give Medical Consent
<b>Newf.</b>	Enduring Power of Attorney	Advance Health Care Directive
<b>P.E.I.</b>	Power of Attorney During Legal Incapacity	Health Care Directive