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ESTATE PLANNING GUIDE

Part II – Planning for Incapacity

2200-201 Portage Avenue
Winnipeg, Manitoba, R3B 3L3

tmlawyers.com

INTRODUCTION

Estate Planning is the process of anticipating and arranging, during your lifetime, for the orderly management and disposal of your assets in the event of your incapacity or death. Estate Planning sometimes also includes planning for health and end of life care. The ultimate goal of estate planning can only be determined by the specific goals of the person and can be as simple or complex as the person's wishes and needs directly.

The purpose of this book is to give you a basic understanding of the key issues relating to incapacity planning in Manitoba (Powers of Attorneys and Health Care Directives). The law relating to estate planning and incapacity in Canada is province specific and laws change over time. This guide does not address the laws in other Canadian provinces and is only current until October 1, 2023.

This Guide is intended to give you an understanding of the key issues related to preparing powers of attorney and health care directives, and the role of the attorney and proxy.

Basics of Incapacity Planning

Incapacity planning means putting in place measures required to ensure that the right people will be in place and able to support you and, if required, make decisions for you, in the event that you are unable to do so yourself. Planning could include financial planning, insurance planning, and planning for aging in place or in care, but from a legal perspective, it really means having the right legal documents in place to allow someone to make financial and care decisions for you if you are unable to do so yourself. Proper planning also provides peace of mind for yourself and for those you care about and reduces the burden imposed on those who will be called upon to help you.

POWERS OF ATTORNEYS

Many different types of Powers of Attorney exist. This guide will only deal with Enduring Powers of Attorney. Enduring Powers of Attorney allow you to choose who will manage your property and financial affairs in the event that you are no longer able to make those decisions on your own. Giving power of attorney to someone that you trust provides you with the peace of mind of knowing that person will take charge of your property and financial affairs at a time in your life when you may be vulnerable and require support. It is a document that speaks only to the financial care of an individual, however, and does not permit decision-making in respect of medical questions.

Powers of Attorney can state that they come into effect right away, or at a later date identified in the document.

Key Definitions

- **Power of Attorney:** A Power of Attorney is a document in which a person (the "donor") gives authority to another person (the "attorney") to make decisions regarding some or all of the donor's financial and legal affairs.

- **Enduring Power of Attorney:** An Enduring Power of Attorney is a power of attorney that stipulates that it continues to be in force following the donor's mental incapacity.

- **Springing Power of Attorney:** A Springing Power of Attorney only comes into effect upon the happening of a certain event. For example, if the Power of Attorney stipulates that it only comes into effect after a doctor has indicated that the donor is no longer capable of managing their own affairs, the attorney only has the ability to start acting on behalf of the donor once that condition is satisfied.

- **Attorney:** The attorney steps into the shoes of the donor and can do everything set out in the *Power of Attorney Act* of Manitoba, as well as everything set out in the Power of Attorney document, provided that it is something that the donor would have been able to do for themselves.

Enduring Powers of Attorney

Only a Power of Attorney that is "enduring" may be exercised by the attorney if the donor has lost capacity. Regular Powers of Attorney are not necessarily "enduring". In order for a Power of Attorney to be an Enduring Power of Attorney it must clearly state that it continues to be in effect notwithstanding the incompetence of the donor.

Who Should Have an Enduring Power of Attorney?

If you are over 18 and have the legal capacity required to make a Power of Attorney (the legal test is set out below), you can, and should, make an enduring power of attorney.

What Happens When There is No Power of Attorney?

Committeeship: A Committeeship is an Order from the Court appointing a person (the "committee") to make property or personal care decisions for an incapable person where no Power of Attorney document exists and no other party such as a government agency, has decision-making authority of over the incapable individual.

Committee: A committee is a person (or persons) appointed by the Court to make decisions for a person who has been found to be mentally incapable of making decisions regarding his/her own financial affairs or personal care. The Committee is bound by and must obey the terms of the committee's order of the Court, as well as the provisions of *The Mental Health Act* governing committees.

In Manitoba, if you are incapable of managing your property and you have not made a Power of Attorney, then a court-appointed guardianship order must be obtained by any person wishing to take care of your financial affairs or personal and medical care decisions. Applications to the Court are moderately complex and result in significant cost and delay. The cost of a court application for committeeship will usually be at least several thousand dollars. Most importantly, you will not have a say as to who will manage your assets and financial affairs on your behalf. The process can take some time given that affidavits of doctors have to be produced attesting to the incapacity of the individual.

Potential committees should hire an experienced lawyer to assist them with making a committee ship application if there is no valid Power of Attorney document.

KEY POWER OF ATTORNEY CONCEPTS

Capacity

Capacity is relevant as to whether or not a person is capable of making an Enduring Power of Attorney. A person is capable of making an Enduring Power of Attorney if he or she is capable of understanding the nature and effect of the document. Often, the following factors are also considered:

(a) the donor knows what kind of property he or she has and its approximate value;

(b) the donor is aware of obligations owed to his or her dependents;

(c) the donor knows that the attorney will be able to do on his or her behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney, and understands that the attorney must account for his or her dealings with regard to the management of the donor's property;

(d) the donor knows that he or she may, if capable, revoke the enduring power of attorney;

(e) the donor appreciates that unless the attorney manages the property prudently its value may decline; and

(f) the donor appreciates the possibility that the attorney could misuse the authority given to him or her.

Competence

The capacity to manage the property and its converse incapacity are relevant to when many Powers of Attorney come into effect (when the document "springs" into effect), as well as several other issues. Competence is really a more nuanced form of capacity.

A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Note that the tests for capacity and competence are different. On occasion, a person may be competent to grant a Power of Attorney yet incapable of managing their property.

THE BASIC RULES

Freedom of Choice

The basic rule in Manitoba is that a capable individual (see above) can grant a Power of Attorney to whomever they want, and the Courts will rarely over-rule this choice.

The attorney must be a competent adult – someone over the age of 18, who is competent to grant their own Power of Attorney (see above).

Proper Signing

An Enduring Power of Attorney must be in writing and must be signed in accordance with *The Power of Attorney Act* of Manitoba in order to be effective. It must be signed in the presence of one witness. The witness must be one of the following:

- an individual registered to solemnize marriages in Manitoba;
- a judge or a justice of the peace in the province;
- a medical practitioner;
- a notary public appointed for the province;
- a lawyer entitled to practice law in the province;
- a member of the Royal Canadian Mounted Police or a police officer in the province;

and the witness must sign as a witness to the Enduring Power of Attorney. The witnesses must be at least 18 years old and cannot be the attorney or the attorney's spouse or common-law partner.

CHOOSING THE RIGHT ATTORNEY

Being an attorney is a demanding job that requires skill, integrity and judgment. At the best of times being an attorney requires paperwork, keeping good records and handling forms and money. The attorney should be able to invest funds prudently, hire and instruct professionals like lawyers and accountants, open and close bank accounts, and complete and file tax returns. Make sure that you choose someone who has the right skills and aptitude.

Additionally, an attorney is required to act in your best financial interest. Make sure that you choose someone who has the integrity required to understand this and to avoid conflicts of interest.

Location

The attorney is not required to be resident in Manitoba or even Canada. In practice, however, it is sometimes easier if the attorney can be physically present fairly regularly. Tax issues may arise if you appoint a US resident as an attorney. Be sure to discuss the possible tax and investment consequences of having a US resident attorney with your lawyer.

Compensation

Being an attorney is a demanding job. Being an attorney is not something one should do 'as a favour', nor ask someone to do 'for nothing'. You should consider whether your attorney should be compensated for acting, and ideally address the issue in the power of attorney document. If the compensation is not addressed in the power of attorney, the law in Manitoba is not clear as to whether or not the attorney can be compensated.

Avoid conflicts of Interest

It is important not to choose an attorney who will automatically be in a conflict of interest. This can create distrust and increase the possibility of family disputes. In certain circumstances, it may also have adverse tax consequences.

For instance, an attorney who lives with you in your home might want to live with you rent free and use your funds to pay for all of their own household expenses. Others may convince themselves that it is okay for them to take funds from you for their own purposes. This is highly inappropriate, but not uncommon. You should consider possible conflicts of interest and the potential issues that could arise before granting the Enduring Power of Attorney.

Choose successor attorneys

A Power of Attorney may be in place for a long time after it has been signed, whether the attorney is acting immediately on it or not. Someone who was a perfectly suitable attorney at the time of the signing may no longer be able or willing to act many years later. As such, you should consider naming at least one alternate attorney.

Choosing Joint Attorneys

For most people, one trusted attorney is good enough to take care of things like paying the bills and making sure that their finances are well managed. If two or more attorneys are appointed jointly, then a decision must be made by them together. However, appointing more than one person as an attorney has its benefits, not the least of which is oversight. If you think that the person that you wish to name as your attorney requires oversight, then adding one more person to act jointly with them as your attorney might be a good idea.

In Manitoba, the Power of Attorney Act does not recognize the appointment of joint and several attorneys (meaning that they can act together and alone, independently from the other named attorney).

THE DUTIES OF THE ATTORNEY

The attorney named in a Power of Attorney can do everything that the document allows him or her to do. Often Powers of Attorneys are drafted to be general in nature and encompass everything that the donor can do, with the exception of making a Will and changing beneficiary designations. It is a very powerful document and it should be granted and handled with great care.

Legal Test

The legal test to be applied to the conduct of the attorney is dependent on whether the donor is competent or incompetent as well as whether the attorney is compensated or not compensated.

- Competent donor:
    - As long as the donor is competent, the attorney is an "agent" of the donor and acts in accordance with the instructions provided by the donor.
- Incompetent donor:
    - if the donor is incompetent, the attorney is a fiduciary whose powers and duties are to be exercised and performed diligently, with honesty and integrity and in good faith, for the incompetent person's benefit.
    - An attorney acting under an Enduring Power of Attorney when the donor is incompetent must focus on the best interests of the donor.
    - The attorney is not entitled to make decisions based on what is good for the attorney, the donor's family or beneficiaries unless the document specifically provides for that. All decisions must be based on the best interests of the donor.
- Attorney without compensation
    - An attorney who does not receive compensation for managing the property is held to the standard of the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.
- Attorney with compensation
    - An attorney who is compensated must exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.

As you can see, the attorney held to the highest legal standard of care is a compensated attorney acting for an incompetent donor. Whereas, the attorney held to the lowest legal standard of care is the uncompensated attorney acting for a competent donor.

Explanation, Participation and Consultation

The attorney should encourage the donor to participate, to the best of the donor's ability, in the attorney's decisions. This means fostering regular personal contact between the donor, as well as with supportive family members and friends of the donor, and the attorney should consult from time to time with supportive family members and friends of the donor who are in regular personal contact with the donor and the persons from whom the donor receives personal care. Regardless of that consultation, the attorney remains responsible for the consequences of all decisions made.

Keeping Accounts & Records

An attorney must keep detailed accounts and records of all transactions involving the property of the donor. This includes detailed records of all assets, all income, all expenses and dispositions of assets. The attorney must maintain these records until relieved of the obligation – usually by court order, or, by giving the records to the personal representative of the estate of the donor after the donor's death.

Unless the Power of Attorney documents authorize a particular person to request an accounting from the attorney, an attorney is required to account annually to the nearest living relative of the donor.

Many attorneys fail to keep proper records. This exposes them to liability and can create unnecessary distrust. An attorney should avoid cash transactions, always get and retain receipts, and ensure that there is a well-documented and properly organized paper trail for the entire period that they are acting as an attorney.

PASSING ACCOUNTS

Passing accounts is the process of formally submitting accounts to court for approval. This is the most common method of airing and resolving disputes about the actions of an attorney. Similarly, attorneys who think that they have been unfairly accused of improper conduct can use a formal passing of accounts to secure court approval of their actions.

An attorney may voluntarily choose to pass their accounts, or, may be required to pass their accounts. For instance, the personal representative of the estate of a deceased donor may require an attorney who acted under a power of attorney prior to the death to pass their accounts. If the attorney is the same person as the personal representative of the donor's estate, the beneficiaries of the estate may require the attorney to pass their accounts at court.

A passing of accounts is a formal court proceeding governed by the Court of King's Bench Rules. Mandatory rules govern every aspect of these proceedings, including the form and content of the accounts, the process for initiating a passing of accounts, the parties who must be served and how, the rights of the various parties to submit evidence and argument and contest the attorney's accounts, and the right of various participants to reimbursement of some or all of their legal fees.

HEALTH CARE DIRECTIVES

A Health Care Directive is a document which allows a person (the "grantor") to express their wishes about the type of health care they wish to receive if they become unable to communicate those wishes. A Health Care Directive also allows the grantor to give authority to another person (the "proxy") to make medical decisions on their behalf if they are unable to communicate those wishes themselves.

Having a Health Care Directive relieves the burden on your loved ones and on your health care professionals of guessing what your wishes might be and confirms who is authorized to make health care decisions on your behalf.

Making a Health Care Directive

The Manitoba government does have a form of health care directive online that any person can use to express their wishes. Many lawyers have their own forms for Health Care Directives that are used based on the needs and wishes of their clients, however, there is no prescribed form. A Health Care Directive may be made by anyone capable of making a health care decision and understanding the consequences of that decision provided that they are at least 16 years of age. There is no formality required to the document: it does not require a witness, or any specific elements, to be considered a valid Health Care Directive. A Health Care Directive does not have to appoint a proxy and can be solely an expression of the wishes of the individual for a certain type of care. A Health Care Directive does not grant any power to another party in respect of the property or financial affairs of the individual. Thus, any decision relating to the *cost* of medical care falls under the purview of an attorney appointed under Power of Attorney.

It is strongly recommended you talk to your doctor and/or lawyer before preparing a Health Care Directive. Such professionals can help you ensure your instructions are clear and can be easily understood by your proxy and by those who provide treatment. If you have strong religious beliefs, you may also wish to speak to your religious leader in order to ensure that the tenets of your faith are incorporated into your Health Care Directive.

Choosing a Proxy

Being a proxy can be an emotionally demanding job. It requires interpersonal and communication skills, trustworthiness and compassion. Make sure that you choose someone who has the right skills and who has the fortitude to make hard healthcare decisions on your behalf. You will want to name someone that you trust to make decisions based on your values and wishes. This person should also be able to communicate respectfully with your loved ones. Make sure that you choose someone who has the integrity required to understand this and to avoid supplanting their wishes in the place of your own.

The proxy is not required to be resident in Manitoba or even Canada. Phones, video calls and e-mail have gone a long way to facilitate communication over large distances. Still, it is sometimes comforting to have a proxy physically present to help make medical decisions. The proximity of the proxy should be considered, but it should be secondary to ensuring that the proxy can be trusted to make decisions based on your wishes and instructions.

You may also consider appointing an alternate proxy, in case the primary named proxy is unable or unwilling to act.

Providing Instructions and Expressing Wishes

A Health Care Directive gives Manitobans the right to accept or refuse medical treatment at any time. *The Health Care Directives Act* allows you to express your wishes about the amount and type of health care and treatment you wish to receive, should you become unable to communicate.

You should consider speaking to your doctor and to your lawyer before writing out your wishes. This will ensure your directions are clearly understood by those providing the treatment. Not providing clear instructions may affect the care you receive.

Making Your Health Care Directive Accessible

The wishes you express in your Health Care Directive are binding on your friends, relatives and health care professionals (unless they are not consistent with accepted health care practices). However, healthcare professionals treating you are not obliged to search for or ask about a signed Health Care Directive. It is important to be sure that family, friends, your doctor and your proxy know you have a Health Care Directive and know where it can be found.

Frequently Asked Questions

Can a proxy give consent for Medical Assistance in Dying (MAID) in Manitoba?

At this time, medical assistance in dying can only be provided to patients who can give consent. Consent through court appointed committee, substitute decision maker or proxy is not permitted.

To be eligible for medical assistance in dying in Manitoba, all of the following conditions must be met:

1. Be eligible for health services funded by the provincial or federal government.
2. Be at least 18 years old and capable of making decisions about your health.
3. Have made a voluntary request for medical assistance in dying free of any outside pressure or influence.
4. Have given informed consent to receive medical assistance in dying after being made aware of all options available to relieve your suffering, including palliative care.
5. Have a serious and incurable illness, disease or disability (not including mental illness*).
6. Be in an advanced state of decline in capability that cannot be reversed.
7. Be suffering unbearably from your illness, disease, disability or state of decline.

* Note: Federal law indicates that Canadians with mental illness as a sole medical condition will NOT be eligible for MAID until March 2024. There are no exceptions to this law.

Can a proxy consent to the donation of organs while I am still alive?

Unless the Health Care Directive expressly provides otherwise, a proxy cannot consent to the removal of tissue from your body, while living, (i) for transplantation to another person, or (ii) for the purpose of medical education or medical research.

Prepared by Solange Buissé in collaboration with the Wills and Estates Practice Group of Taylor McCaffrey LLP.
