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Power of Attorney for Property

In order to ensure that their property and income are managed properly and carefully, people are wise to appoint a close and trusted relative or friend to have a power of attorney over property. The person who gives the power of attorney is called the "donor," and the "attorney" (not necessarily a lawyer) can be any mentally competent person who has reached the age of majority and is prepared to take on the responsibility of carefully managing the donor's affairs without taking personal advantage.

A power of attorney will not be valid unless signed and dated by the donor and witnessed, perhaps by a specific number of people. There may be restrictions on who can be a witness—for example, some provinces and territories do not permit the attorney's spouse or a person under the age of majority to witness the document. While only the donor can execute the power of attorney, he or she is wise to secure the attorney's consent to act in this role first.

The power of attorney can be revoked at any time, as long as the donor is mentally capable when executing the revocation. Whether or not the law in the donor's jurisdiction requires it, the donor should revoke this responsibility in writing, retrieve the original power of attorney document and notify anyone who may have a copy.

A donor should choose an attorney carefully. The position of attorney is one of trust, because the attorney has the power to do and authorize anything the donor might have done. Furthermore, any decisions the attorney makes about the donor's property are deemed to be made with the donor's consent.

All provinces and territories in Canada now allow "enduring" powers of attorney for property; this means that the power of attorney will survive the donor's subsequent mental incompetency, but only if the donor makes a statement to this effect in the document itself. Anyone relying on a power of attorney document should check its wording to be certain that it is effective notwithstanding any subsequent incapacity, since some

jurisdictions made the enduring power of attorney law only in the mid-1990's.

Manitoba has had a law since 1996, which empowers people with mental disabilities to make as many of their own decisions are they are competent to do. The Vulnerable Persons Living with a Mental Disability Act also aims to curb their exposure to physical and emotional abuse. B.C proclaimed a similar law in 2000.

If the power of attorney is defined as general, the attorney has complete power to do everything that the donor could have done in financial matters, except make a will. If the power is specific, it may be limited to dealing with particular real estate or bank accounts, for example. An attorney for property cannot make personal care decisions, unless a separate personal care document is signed, sometimes known as a "living will," "power of attorney for personal care" or an "advance directive."

The attorney should have some familiarity with financial matters in order to manage the donor's affairs. Attorneys may also be asked to prepare accounts to show what they have done with a person's finances. An attorney claiming compensation for their work may also be held to a higher standard of care than one who receives no compensation.

An attorney has a legal obligation to act in good faith and for the benefit of the donor. If an attorney fails to do so, the power of attorney may be revoked in some provinces. In a 1994 Ontario case, a son, who had been appointed attorney by his mother, was called to account by her estate. On her death, her executors could not trace the assets of her estate. Although the executors had information that the estate was worth about $330,000 in 1991, they could find very little at the time of her death in 1994. Documentation indicated that the son, a beneficiary of only $10,000 in his mother's will, had used the power of attorney to remove approximately $250,000 from her bank accounts in 1992. Attorneys do not have authority to transfer assets into their own names, even if the intent is to avoid court and administration costs for estate planning purposes. If a donor wishes to allow their attorney the power to make gifts, they should specify this in the Power of Attorney.

Provinces have different rules about powers of attorney for property. In Ontario, for example, in order to be mentally capable of giving a power of attorney, donors must meet certain conditions. They must know what property they have and its value, what obligations are due to their dependants and what powers they are

giving. They must also recognize that the attorney must account to them for what she or he does; that they can revoke the power of attorney; that the value of the property may decline if mismanaged; and that the attorney could misuse this authority.

Powers of attorney should be reviewed regularly, especially if the donor marries, separates or divorces, or experiences any significant change in health or financial situation. Close relatives or business associates, if applicable, should be informed that a power of attorney for property exists, but they do not need to know the contents. Donors would also be wise to keep a list of the people who have copies with their own copy of the document.

As provincial laws may differ, a person should obtain legal advice before executing any power of attorney.

Power of Attorney for Personal Care (Living Will)

A living will is a type of advance directive; in essence, it is a power of attorney that provides for personal care. This document allows people to stipulate in advance a substitute decision-maker to make their preferred personal care decisions for them if they become mentally incapable. These decisions may be as personal as where a person will live, what he or she will eat and what kind of medical treatment he or she will have. Often, the direction is negative—that no heroic efforts are to be made to save the person's life if they will leave the person in a vegetative state.

Living wills were first given legal sanction in Canada in 1990, and since then they have received growing public acceptance. In the 1990 Ontario Court of Appeal decision that first sanctioned these directives, the court permitted advance instructions to discontinue potentially lifesaving medical treatment, and ruled that "competent adults . . . are generally at liberty to refuse medical treatment even at the risk of death."

The case considered the actions of a doctor who, in an emergency treatment to save an unconscious patient's life, gave her a blood transfusion, despite a card in her purse expressly forbidding such transfusions because she was a member of the Jehovah's Witnesses. Although the doctor took the position that he had a duty to save the woman's life, he was held to have acted improperly and to have

committed the criminal offence of battery. The woman sued the doctor and was awarded $20,000 in damages.

While the courts struggled with this issue case by case, provincial governments gradually began to legislate the validity of living wills. At the time of writing, only New Brunswick and the Territories did not have such legislation.

Whether or not a power of attorney for personal care is approved in a particular jurisdiction, the document may be persuasive at least as a guide to a person's doctors. And whether or not a person chooses to put something in writing, the exercise of communicating her or his thoughts and wishes while in good health will help those who may be called upon to make such decisions for her or him in the event of serious illness. A person's doctor should be made aware of any living will.

Living wills are not mandatory. For example, long-term care facilities may find it useful to request such an appointment, but they cannot legally require it. As with a power of attorney for property, the donor must be mentally capable when making a power of attorney for personal care.

The choice of attorney for personal care decisions is very important. The person appointed should know the donor well and, preferably, hold similar values. The attorney must also have sufficient time and interest to take on this responsibility. It is important that the donor and attorney discuss the appointment. For example, the donor may want to specify different degrees of treatment, depending on the type or severity of an illness. He or she may also wish to vary instructions for treatment depending on whether the condition is temporary or permanent. Donors may wish to provide very specific instructions or conditions in writing, or simply tell their attorney what they want—either way, the attorney is obliged to follow the donor's wishes. An attorney for personal care should consider the donor's welfare and interests, and assist him or her, if possible, to have some independence, maintain contacts with family and friends, and consult, as appropriate, with the attorney and the person providing the personal care.

The attorney for personal care does not have to be the same person as the attorney for property and, in some cases, should not be, as these people perform very different functions.

A province or territory may have rules governing who cannot be appointed as an attorney. They may exclude a minor**,** health care

provider such as nursing home staff, a doctor, nurse or landlord, or others who may be in a special position with the donor; they do not exclude a spouse or partner.

Donors may revoke a power of attorney for personal care as long as they are mentally competent. They should also review the document from time to time to ensure that the provisions are still appropriate.

C Linda Silver Dranoff 2005