O'SULLIVAN
ESTATE LAWYERS

O'Sullivan Estate Lawyers LLP
TD Bank Tower, Toronto-Dominion Centre
66 Wellington Street West, Suite 3430, P.O. Box 68
Toronto, ON M5K 1E7

osullivanlaw.com
T 416-363-3336
F 416-363-9570

Advisory

Planning for incapacity using a power of attorney

It is possible that at some point in our lives we may become incapable of making decisions for ourselves, either temporarily or permanently, due to injury or illness. By making a power of attorney, you can allow others to make decisions on your behalf should you become incapable.

When you think about your assets in the context of estate planning, it is important to distinguish between a will and a power of attorney. A will deals with disposition of a person's assets after death and takes effect only on death. In contrast, a power of attorney is used during one's lifetime and terminates on death.

There are two types of powers of attorney which are commonly used for persons in Ontario: a continuing power of attorney for property and a power of attorney for personal care. The goal of this Advisory is to provide a brief overview of each of these powers of attorney and to provide practical considerations in planning for incapacity.

LEGISLATIVE FRAMEWORK

The Ontario Substitute Decisions Act, 1992 (the "Act") protects the rights, interests and well-being of individuals who become incapable of making decisions about their property or personal care. The Act allows a person some control in making decisions regarding his or her property and in deciding aspects of his or her personal care when the person is no longer capable of making such decisions. The Act protects incapable people from financial or other abuse by creating safeguards. It also sets out the rights and obligations of an incapable person's attorney. "Attorney" in this regard means a substitute decision-maker and not a lawyer.

CONTINUING POWER OF ATTORNEY FOR PROPERTY

General

Under a continuing power of attorney for property, you can give to others the legal authority to make decisions about the management of your property (that is, your assets and financial affairs) which will continue should you become incapable. Your attorney for property has the power to do anything on your behalf with respect to your property that you could do if capable, except make a will. The granting of a continuing power of attorney for property does not limit your power to act on your behalf. Instead, it authorizes an attorney to share that power with you, and to act on your behalf.

The Act defines a person to be incapable of managing property if he or she 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.

Under the Act, if a person does not have a power of attorney for property which is effective after he or she becomes incapable, it may be necessary for family members or other interested persons to apply to court to have a "guardian for property" appointed to manage the incapable person's financial affairs. Unfortunately, the procedure for appointing a guardian for property is lengthy and expensive, and does not allow you to choose who will manage your property or how it will be managed should you become incapable. It also involves court or government supervision of the management of your affairs, which adds additional expense and complexity for the person(s) appointed to manage your affairs. For all of these reasons, we strongly recommend that as part of your estate planning you consider making a continuing power of attorney for property to appoint a person or persons who will make financial decisions for you if you become incapable of making such decisions for yourself.

When does a Continuing Power of Attorney for Property come into Effect?

You can specify that your continuing power of attorney for property comes into effect only upon a specified event (for example, if you are assessed as being incapable of managing property) or that it is immediately effective. Because of the difficulties which often arise in establishing to third parties (such as banks and other financial institutions) that a person is incapable of managing his or her financial affairs and that a continuing power of attorney for property is in effect, continuing powers of attorney for property are usually prepared to have immediate effect. To avoid misuse, they can be held by a trusted third party (often the law firm which prepares it) with a direction providing the terms upon which it may be released.

Providing Direction for Property Decisions

Continuing powers of attorney for property may be either general or limited. A general power of attorney for property can grant the attorney for property broad authority and contain no restrictions on the purposes for which it may be used. On the other hand, a limited power of attorney for property may be restricted to a particular asset or transaction and/or period of time, or provide special directions for the management of your financial affairs. For example, if you are selling an asset but are going to be away on the closing date, you may grant a limited power of attorney for property to another person to act on your behalf on the sale of the asset for the period of time while you are away. Other examples of limited powers of attorney for property include those which provide for the sale or retention of specified assets should the grantor later become incapable, or those which provide specific investment guidelines for the attorney. In addition, if you have signed a continuing power of attorney for property at your bank, it is limited to dealing with matters at the particular bank and is ineffective to deal with your other assets.

In some circumstances, it may be appropriate to have multiple continuing powers of attorney for property. For example, a person may grant both a general power of attorney for property to his or her spouse and a limited power of attorney for property to a business associate restricted to the operation of the business. It is important to note that the authority of your attorney to deal with your assets outside of Ontario will depend on the nature of the asset and the jurisdiction in which it is located. It may be appropriate to have a continuing power of attorney for property for assets in each jurisdiction.

Choosing an Attorney for Property

Under the Act, a person must be at least 18 years old and mentally capable to grant a continuing power of attorney for property. The person(s) you select to act as your attorney(s) for property must be at least 18 years old and mentally capable. If you appoint two or more attorneys, your attorneys must act jointly unless the continuing power of attorney for property provides otherwise. You may also name one or more alternate attorneys to act should the primary attorney(s) you choose not be able to act or to continue to act.

In choosing a person to manage your property should you be incapable of managing it yourself, it is important to consider the nature of your assets and financial affairs, and the ability of your proposed attorney for property to manage them. If you have a spouse and adult children and your assets and financial affairs are relatively straightforward, you may consider appointing your spouse as the primary attorney for property and your adult children as the alternate attorneys. If you have complex business interests, the handling of which your spouse finds daunting, you may wish to consider appointing your spouse

and one or more others to act jointly as your attorneys, or you may wish to grant a general power of attorney to your spouse and a limited power of attorney to one or more business associates, restricted to the operation of the business. If you are thinking of appointing two or more attorneys to act together, for practical reasons a maximum of three attorneys is generally advisable. You should also carefully consider the compatibility of your proposed attorneys and their ability to work together. In some circumstances, it may be appropriate to consider appointing a trust company, either alone or together with others, to manage your assets and financial affairs.

Example:

Consider the situation where Doug is married to Rita and they live in Oakville. Doug and Rita hold their home, some bank accounts and their investment portfolio jointly. The couple has twins who are fifteen years old, Alyssa and Claire. Doug and his sister Mary inherited an interest in several commercial properties from their father from which they receive an income; Doug and Mary hold their interest jointly. Doug wishes to prepare a continuing power of attorney for property.

Doug may consider granting a general power of attorney for property to Rita. Given that his daughters are young, Doug may wish to appoint alternate attorney(s) such as his sibling for now, with the idea of revisiting the appointment of his daughters as alternate attorneys when they are older. In relation to the commercial properties, Doug may consider granting a limited power of attorney for property to Rita and Mary jointly so that they will act together with regard to his interest in the properties, or he may wish to grant the power to Rita alone, and appoint Mary as an alternate attorney for property.

Duties of Attorney for Property

The Act requires an attorney for property to act diligently, with honesty and integrity and in good faith. It is also the attorney's duty to explain his or her powers and duties to the incapable person, to encourage the person to participate in decisions about his or her property, to foster regular personal contact with the incapable person and supportive family members and friends, to consult with those supportive family members and friends, and to keep proper accounts of all transactions involving the incapable person's assets.

Compensation

Unless there is specific provision in the continuing power of attorney for property, an attorney for property is entitled to be paid for services rendered in accordance with a

prescribed fee schedule set out under the Act, and to be reimbursed for all reasonable out-of-pocket expenses.

Revocation

You may revoke a continuing power of attorney for property at any time while you are capable. As with granting a continuing power of attorney for property, there are formal requirements to revoke it which must be complied with.

While the Act seeks to protect the property of incapable persons by ensuring safeguards, it should be appreciated that a continuing power of attorney for property is a powerful grant of authority. It requires, among other matters, careful consideration of the person(s) to whom the power is to be given and the extent of the authority granted. It is advisable to obtain legal advice on making a continuing power of attorney for property, including appropriate ways to minimize the risk of misuse or imprudent use of the authority.

Alternatives to Continuing Powers of Attorney for Property

While a continuing power of attorney for property is generally considered the most economical and simple way to deal with decision-making when a person is incapable, there are other alternatives which may be appropriate depending on individual circumstances. First, the joint holding of assets is a convenient way to transfer title directly to the surviving joint holder; however, this alternative does not deal with decision-making on behalf of the joint holder of property who becomes incapable. Second, inter-vivos trusts (including alter ego or joint partner trusts for persons age 65 or older) also provide a vehicle for the management of assets, including upon incapacity. Trustees manage assets for the benefit of beneficiaries in accordance with specified terms. At the end of the trust's term, the assets are distributed to the beneficiaries pursuant to the terms of the trust. The trustee commences managing the trust property when the trust is created – not when the person creating the trust becomes incapable or dies. Accordingly, in the event of incapacity there is already a vehicle (the trust) in place providing for continuous management.

POWERS OF ATTORNEY FOR PERSONAL CARE

General

The Act also allows you to appoint an attorney to make personal care decisions for you in the event you are no longer mentally capable of making such decisions for yourself. Under the Act, a person is incapable of personal care if he or she is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene and safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Under the Act, if a person does not have a power of attorney for personal care, it may be necessary for a family member to apply to court to have a "guardian for personal care" appointed to make decisions in regard to the incapable person's health care, nutrition, shelter, clothing, hygiene and safety. Just as with the appointment of a guardian for property, the procedure for appointing a guardian for personal care takes time, may be expensive, and does not allow you to choose who will make personal care decisions for you. For these reasons, we strongly recommend that as part of your estate planning you consider making a power of attorney for personal care to appoint someone who will make decisions about your personal care if you become incapable of making these decisions for yourself.

When does a Power of Attorney for Personal Care come into Effect?

Unlike a continuing power of attorney for property which may be made effective immediately under the provisions of the Act, a power of attorney for personal care only takes effect when you become incapable of making personal care decisions. For that reason, your attorney may use the power of attorney for personal care only when he or she has reasonable grounds to believe that you are incapable of making personal care decisions, and only after your attorney for personal care has explained to you why a personal care decision is necessary, the nature of the decision, and that you have a right to object to such decision.

Choice of Attorney for Personal Care

To grant a power of attorney for personal care, you must be at least 16 years old and mentally capable. The person(s) you select to be your attorney(s) for personal care must be at least 16 years old and mentally capable. As protection for the grantor, the Act specifically prohibits a person from acting as an attorney for personal care if that person provides health care or certain services to the grantor for compensation, unless that person is also the grantor's spouse, partner or relative.

Just as with the power of attorney for property, you should consider appointing primary attorney(s) for personal care, and alternate attorney(s). If you appoint two or more attorneys for personal care to act together, your attorneys must act jointly unless the power of attorney for personal care provides otherwise. In addition, we generally recommend that for practical reasons you consider limiting the number of attorneys acting together to a maximum of three and that you consider the compatibility of your proposed attorneys.

In choosing who you would appoint to make personal care decisions for you if you are incapable of making such decisions for yourself, you may consider appointing one or more family members or close friends whose judgment you trust to make your personal decisions.

Example:

Consider the situation where Jane is single, living in Toronto and has three adult children: Alex who lives in Chicago, Illinois; Bruce who lives in Barrie, Ontario; and Carolyn who lives in Cambridge, Ontario. Jane would like to appoint her three children to act jointly as her attorneys for personal care, but is concerned that none of them live in Toronto. She is confident that each of her children will make personal care decisions in her best interests.

Jane may wish to consider appointing her three children to act jointly as her attorneys for personal care. This means that the children must make personal care decisions for Jane together. Alternatively, Jane may wish to consider including a majority decision clause in her power of attorney for personal care providing that if there is a disagreement among her children on a matter of her personal care, the decision of the majority governs.

Providing Direction for Personal Care Decisions

You may grant your attorney for personal care wide discretion to make personal care decisions on your behalf, or you may restrict the attorney's discretion by providing instructions in the power of attorney for personal care, in an accompanying letter or other written document, or even verbally. These instructions may specify types of medical treatment or other personal care that you wish to receive or refuse. If instructions for care are given, whether written or verbal, your attorney for personal care is under a legal obligation to follow them, unless it is impossible to do so. If no instructions for care are specified, your attorney for personal care must determine if you expressed any wishes while you were still capable, and if so, he or she is obliged to follow such wishes.

As a result, if you would not wish "heroic" or artificial life-support procedures continued if there is no reasonable chance of your recovery, you can ensure your wishes will have legal effect and be binding on your attorney for personal care. Instructions for personal care matters, termed an "advance medical directive" or "living will", may be included in, or prepared in conjunction with, the power of attorney for personal care, so that they will have legal effect. The attorney for personal care must rely on these directions in instructing doctors and other medical personnel. This may be of particular importance to persons who have been diagnosed with a terminal illness who wish to provide direction for their care in the event they become incapable of making personal care decisions during the course of their illness.

Duties of Attorney for Personal Care

An attorney for personal care is required to act diligently, with honesty and integrity and in good faith. In addition, the Act provides that an attorney for personal care also has a duty to explain his or her powers and duties to the incapable person, to encourage the person to participate in decisions about his or her personal care, to foster regular personal contact with the incapable person and supportive family members and friends, to consult with those supportive family members and friends, to foster the incapable person's independence, to choose the least restrictive and intrusive course of action that is available and appropriate, and to record decisions made on the person's behalf.

Compensation

Unlike a person acting under a power of attorney for property, a personal care attorney has no statutory entitlement to compensation. Any right to compensation must be provided in the document if it is to be authorized.

Revocation

You may revoke a power of attorney for personal care at any time while you are capable. There are formal requirements for the revocation which must be complied with for it to be legally effective.

CONCLUSION

If a person becomes incapable of managing his or her property or incapable of making personal care decisions, others will have to make these decisions on behalf of the incapable person. In order to have control over who the decision-maker will be and to provide guidance in making such decisions, we recommend you prepare powers of attorney for property and personal care as part of your estate planning. Important consequences will flow from decisions about who you appoint as an attorney, what powers and duties are given to the attorney, safe-keeping of original powers of attorney, and the timing and method of their release. Unless a power of attorney clearly sets out your intentions, your wishes may not be fulfilled should subsequent incapacity occur. For all of these reasons, we recommend that you seek legal advice to ensure that your wishes and objectives are achieved in planning for incapacity.