Reference Guide

PLANNING FOR INCAPACITY

Incapacity. The word alone conjures up uncomfortable feelings and images, and is certainly not a subject many people like to consider.

However, incapacity can happen to anyone, whether as a result of a sudden event like an accident or a stroke, or over time, as a result of age or illness. And, unfortunately, incapacity can last a very long time.

Aside from the personal loss, the impact of being incapacitated can be significant in other ways as well. Without proper documentation in place, there can suddenly be no one looking after the incapacitated person's financial affairs, so bills and other financial commitments are not paid, investment decisions are in limbo, and tax returns and other matters are not completed.

Once a person loses his or her mental capacity, generally the only option is to have someone apply to court to be appointed to look after that person's financial affairs. This can be a costly and time-consuming process, and may even result in the appointment of an individual that the incapacitated person would never have chosen. The court process also involves an ongoing obligation to report back to the court, sometimes every year, regarding how the incapacitated person's finances are being handled, which also adds costs and aggravation.

Decisions regarding personal matters such as health care or medical treatment may also be more difficult if the person is not able to communicate his or her wishes.

Fortunately, there are things that you can do while you are capable, to ensure that your personal and financial affairs are handled appropriately in the event of any future incapacity.

Dealing with your property during incapacity

An important step is to have a power of attorney prepared, appointing someone you trust to look after your property and financial matters on your behalf if and when you are not able to do so yourself.

Depending on your province or territory, the document may also be called a power of attorney for property, an enduring power of attorney (or a mandate for property in Quebec). The person appointed is often referred to as an attorney – a term that is used simply to describe the person who acts under a power of attorney. It does not imply that the person is or must be a lawyer.

To be effective during incapacity, a power of attorney must state clearly that it is to be enduring – that is, that it is to continue to be effective during any period of mental incapacity (or otherwise phrased in a way that meets provincial or territorial requirements).

Typically, an attorney can do on your behalf whatever you could do yourself in connection with your own financial and property matters, except make or revoke a will.

To ensure that there is no uncertainty or dispute about whether you intend for the attorney to be able to take certain steps when acting for you, it is advisable to specifically set out in the power of attorney document the powers that your attorney is to have.

Generally, you should include broad powers covering a range of circumstances, so that the attorney can act most effectively on your behalf. Some of these powers include:

- The power to delegate investment decisions through the use of mutual funds, pooled funds, investment counsel or a discretionary investment manager. This power should also include the power to authorize investment counsel or a discretionary investment manager to sub-delegate its investment management authority. This can help to ensure that the financial arrangements that you had made while capable can be continued.

- The authority to initiate and implement tax planning strategies on your behalf, including strategies that are designed to save taxes for your estate. Without such a power, the attorney would be limited to strategies that would strictly benefit you personally.

In addition, it is also wise to specifically address other matters in a power of attorney, such as:

- whether the attorney should be paid for acting

- whether an attorney can make gifts on your behalf to individuals or to charities

- whether the attorney could transfer your assets to himself or herself, or to others outright, or into joint ownership with right of survivorship.

Given the powers that an attorney should have, and the fact that you would not be capable of monitoring the attorney's activities personally, the attorney must be trustworthy and must appreciate that he or she must always act in your best interests.

You should also name one or more alternate attorneys to act in case the primary attorney is not alive or is not willing or able to act or to continue to act. At least one of your alternate attorneys should be younger than you to increase the likelihood that he or she will be able to act when needed. You should also specify what evidence would be required to verify that the triggering event for your alternate attorney to act has occurred.

Note also that you may, in most provinces, if you wish, appoint two or more attorneys to act together on your behalf. If you do so, however, you should also include a mechanism for resolving possible differences of opinion that could arise between them.

If you own private corporation shares, care should be taken when selecting attorneys to ensure that you will not inadvertently trigger adverse tax consequences for the corporation. This could arise when you execute a power of attorney that names an attorney who owns shares in a different private corporation. This concern may be able to be avoided through proper planning.

Health care decisions during incapacity

Another step in planning for possible incapacity is to prepare a document setting out how, and by whom, health-care decisions should be made on your behalf if you are incapable of making, or communicating, these decisions yourself.

This can be of invaluable help to family members, friends and medical caregivers and can provide you with the comfort that your wishes would likely be followed.

There are variations in the actual name of the document used for this purpose, depending on your province or territory. For example, the document may be called a health care directive or advance directive or some variation of these names. In Ontario, it is called a power of attorney for personal care, while in BC, it is called a representation agreement. Quebec uses the term mandate for person.

The scope of the document also varies in each province or territory. Typically, the legislation allows you to name a person to make medical or health care decisions on your behalf. This person is sometimes referred to as an attorney, a proxy, a representative or a guardian for personal care.

In most cases, you can also set out any specific wishes that you may have regarding your future health care or medical treatment. Often, individuals will use this document to elaborate on how they would like to be cared for when they are in a terminal or incurable condition.

However, decisions regarding your medical or personal care may be needed in many other situations as well. For example, you may be unable to communicate your wishes as a result of an injury or illness from which you are expected to recover. For this reason, it is valuable to appoint someone to make personal care decisions on your behalf whenever needed.

Just like a power of attorney for property matters, it is also recommended to appoint an alternate person to make medical or health care decisions on your behalf in the event your primary person is unwilling or unable to do so and the same considerations relating to the appointment of an alternate discussed under the previous section would apply.

Preparing powers of attorney and health care directives

Because each province and territory has its own laws and requirements governing powers of attorney and health care directives, it is generally advisable to have these documents prepared for you by professional legal advisors who practice in this area.