

## WILLS and POWERS OF ATTORNEY – AN INTRODUCTION

Wills and Powers of Attorney are two of the most important documents that most people will ever sign. Yet, there is a great deal of uncertainty over whether people need them, why people need them, whether lawyers are needed to prepare them and what information to take to a lawyer in preparing these documents.

The purpose of this Handbook is to provide you with information that will help you understand why it is important for you to sign a Will and Powers of Attorney, what the role of the lawyer is, and what information the lawyer needs in order to properly prepare these documents for you.

In order to explain these documents it is helpful to think of a legal phrase which is easy to understand; “When does the document speak.”

When you sign a Will, it is intended that the document will speak for you after your death. When you sign Powers of Attorney, the intention is that these documents will speak for you during your life.

### WILLS

These are more formally known as Last Wills and Testaments.

In a manner similar to the situation with incapacity, **the Succession Law Act** determines how the property of a deceased person is distributed if they do not leave a valid Will. In addition, **the Succession Law Act** established procedures to determine who will be responsible for managing the property of a person who has died without a valid Will. Again, the rules and procedures established for appointing responsible persons and distributing property are more complicated and more cumbersome than they would be if set out in a Will.

The Succession Law Act provides for portions of a deceased person’s Estate to immediately vest in their children, even if their spouse survives. If you want to be sure that your entire estate passes to your surviving spouse on your death and then to children after spouse’s death, you must leave a Will that expressly says so.

For obvious public policy reasons, the Succession Law Act includes as the children or grandchildren of a deceased person all children conceived within the family tree, no matter what the circumstances of conception. If you want to change this all-inclusive definition of children, exclude a child, or distribute among children in unequal shares, you have to do so in a valid Will.

A person appointed to manage an Estate under the Succession Law Act often must post a bond. A person appointed to manage an Estate in a Will is not required to post a bond in order to carry out their duties.

The list of benefits that will flow to your family from the act of you making a valid Will is practically endless. The benefits translate into fulfilled wishes and savings in money and emotional turmoil. Simply put, if you want to make sure it will happen, write it down in a valid Will.

## WHAT DO I NEED LAWYER FOR?

A lawyer is not a printer. By that, we mean it is not simply a lawyer's job to take your words and put them on paper. The lawyer's skill, training and experience is applied by hearing and advising you on your plans and then expressing those plans in a written clear language that cannot be misinterpreted.

### Hearing Your Plans and Advising

If you have been working with an estate planner, investment adviser, insurance representative, accountant or a combination of such skilled advisers the lawyer will take down the details of the plans you have created. The lawyer's job will be to translate the various aspects of the plan into the precise language to which I referred. There may be some legal consequences of the plan that the other professionals have not had an opportunity to consider. The lawyer will refer those consequences to your other advisers and confer with them in order to ensure that the legal consequences are accounted for in the plan.

If you have not been working with such people in making your plans the lawyer will nonetheless carefully record your plans and will ask you questions concerning your background, immediate family, assets, obligations, debts and insurance.

The lawyer will use this information, knowledge of the law and previous cases in order to advise you whether your plan can be legally implemented. For example, it would not be possible at law for your executor to carry out a wish that your estate be turned into a trust fund "for all of your heirs for now and to come."

In addition, the lawyer may give advice of practical problems with your plans. For example, compare "I want my house left to my children aged 3 and 5," to "If my children are young when I die I would like my house sold and the sale money plus interest used to pay for my children's education." Both express a similar wish, but the latter represents a much more practical way of carrying out that wish.

### The Use of Language

As the old saying goes, "it's not just what you say, but how you say it that counts." Everyone has experienced the difficulties that can arise from miscommunication.

A lawyer trained and experienced in "drafting" Wills considers every word and phrase carefully so as to avoid future confusion as to your wishes. Remember, you won't be there to tell Revenue Canada or your children what you meant. The experienced lawyer knows that disagreements over the meaning of words in a Will end up costing the family money. In many cases, a Will not properly written is the same as a Will not written.

The lawyer's assistance in formulating plans and the lawyer's skill in putting those plans in writing ensures that the Will you sign is a valid Will.

## WHAT DO I HAVE TO DO?

In most cases a lawyer will be able to prepare both your Will and Powers of Attorney at the same time. Normally, the process involves two (2) meetings; one for discussion and instructions, one for signing.

Of course, you will want to discuss cost and payment with your lawyer before you proceed. Costs for the preparation of Wills and Powers of Attorney vary depending on the nature of your estate and the experience of the lawyer. My advice to clients is that the cost for the preparation of these documents should be comparable to the cost of the average automobile repair; that is, somewhere between \$600.00 and \$850.00.

The first thing you have to do is make an appointment with a lawyer whose practice includes the preparing of Wills and Powers of Attorney. I can assure you that your life and plans are sufficiently important that they should be discussed at a meeting with the lawyer and not over the phone. The exchange of information and advice by electronic mail is an alternative, but is not likely to be as productive as a meeting with the lawyer.

As a general rule, the lawyer requires information from you more than documents. In the following pages I set out a list in questionnaire form of the information your lawyer is most likely to require. Discussions between you and your lawyer over this information and your plans may result in your lawyer asking you for further information.

## POWERS OF ATTORNEY

There are two types of Powers of Attorney that people should prepare and sign. They are the **Power of Attorney for Property** and the **Power of Attorney for Personal Care**.

Both documents are designed to speak for a person when they are alive but incapable of understanding their circumstances or needs.

Two factors have made these two documents vital. One is the rapid advancement in medical science. In the not too distant past a serious accident, a stroke, heart attack, or serious illness meant certain and quick death. Cognitive disorders of the mind such as Alzheimer's disease were less common than today because of physical body often deteriorated to the point of death well before the mind. Now, it often happens that people who suffer medical crises remain physically alive yet seriously incapacitated. In addition, cognitive disorders common in ageing are becoming more common.

The second factor is the enacting of the **Substitute Decisions Act** in 1995. Under this legislation a person and their assets come under the guardianship of the **Public Guardian and Trustee for Ontario [the "Public Guardian"]** as soon as they are determined incapacitated. The Public Guardian immediately assumes sole responsibility for managing the incapacitated person's assets and care to the exclusion of everyone else including any spouse or child of the incapacitated person.

A family member or friend of the incapacitated person may make application to assume the role of the Public Guardian, but they must give proper legal notice of this intention to all interested family members. In addition, the replacement guardian must file and follow a Plan with the Public Guardian setting out how the affairs of the incapacitated person are to be managed. In some cases, a replacement guardian will be required to post a bond before they will be approved to assume the role of the Public Guardian.

This approval process for replacement guardianship is not necessary if the incapacitated person has previously appointed a replacement guardian in a signed **Power of Attorney for Property** and **Power of Attorney for Personal Care**. The appointed person will automatically be recognized as having authority to manage the property and care of the incapacitated person.

When you make a Power of Attorney under the **Substitute Decisions Act** you are free to appoint your spouse or child, and, in most cases, this is what is done.

The **Power of Attorney** sets out your wishes as to the authority your appointed guardian will have in managing your property in the event you become incapacitated. Common duties of an appointed guardian under a **Power of Attorney for Property** are the payment of bills out of bank accounts; maintain investment portfolios, the operation of businesses and the payment of chronic care costs. Under the law, the appointed guardian must perform these duties for you in your best interest while you are incapacitated.

The **Power of Attorney for Personal Care** sets out your wishes as to the authority your appointed guardian will have in managing your personal and medical care in the event you become incapacitated. Common duties included instructing doctors and arranging for chronic care at home or in a chronic care facility. In some cases, people use the **Power of Attorney for Personal Care** to give instructions to their appointed guardians about maintaining medical life-support treatment.

**Please Note** that the authority you give to an appointed guardian in both forms of **Power of Attorney** only becomes effective if you become incapacitated.

Obviously, you must prepare and sign these Powers of Attorney before you become incapable.

**-James H. Pratt  
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