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You need to provide me with the proper spelling of everyone's names, the name of your Executor, Alternate Executor, Common Catastrophe Clause (where you wish your estate to go in the event of a common catastrophe taking both of you and your children. Normally, we would give half of the estate to your parents, if alive and in financial need, and your siblings and the other half to your spouse's parents and siblings). I also need the name of a Guardian and alternate Guardian. Once I have this information, I can then proceed to prepare your Wills and Powers of Attorney and then we can make an appointment for you to come in and sign.

RE: YOUR WILLS, POWERS OF ATTORNEY AND LIVING WILLS

I like to provide my clients with a basic summary and an identification of the important issues when they go to either revise their existing Wills or prepare Wills for the first time.

Most spouses prepare what we call a “Sweetheart” or “Mirror Will”, that is, in the event of one spouse’s death their entire Estate is paid to the surviving spouse. Unless there are significant and important tax or liability reasons most spouses should have all of their assets in joint names so that in the event of one spouse’s death their entire Estate vests in their spouse without entailing the significant cost of probate fees paid to the government and the related legal costs associated with this application and certification process.

Life insurance policies and RRSP holdings enable the owner to specifically designate a beneficiary in the event of one’s death and I strongly recommend you look out and review the beneficiary designations of these assets. Again, unless there are specific reasons for such a designation, no where should the word “Estate” be named as a beneficiary as this will only attract added “taxes” and costs. In addition to naming a specific beneficiary there should also be a contingent naming of the further individual(s) to whom you would wish these assets to be paid in order to avoid them from going into your Estate and attracting the additional expenses.

In most orthodox scenarios, you would be the beneficiaries of each others Estate as well as Executor, the person vested with the power of authority to deal with the deceased’s Estate. You need to put your mind to the person(s)

or entity to become involved as an alternate executor should a common catastrophe take both of you. In addition, you would need to consider who you would wish to be the beneficiaries of your common Estate in the event of that common catastrophe so that you do not die intestate and it be left to the courts to have to administer the situation at that time. It is also essential to name an alternate attorney on your Powers of Attorney for Property and Personal Care. This individual is normally a close family member or friend that ideally lives locally to preclude the inconvenience and possible added cost of not being close at hand.

All of my Wills contain what is called a memorandum clause which enables you to do a list of specific items that you would wish to go to specific individuals. I find it most convenient that these individuals and items not be named in your Will in order to allow for flexibility in the future by adding or deleting from the list. The original of this document should be prepared in tandem with your Will and kept with it.

GENERAL INFORMATION ON POWERS OF ATTORNEY

Under the laws of Ontario, a resident has the right to give to another person or persons a Power of Attorney over property and/or a Power of Attorney to authorize decisions regarding personal care. The Continuing Power of Attorney for Property empowers the person or persons you designate to sign documents, enter into contracts, transfer assets, etc. on your behalf. The person or persons to whom that power has been given is called your Attorney. The document transferring that right or giving that right is called your Power of Attorney.

CONTINUING POWER OF ATTORNEY & INCAPACITY

A Continuing Power of Attorney is one which will survive your incapacity. A Power of Attorney will be continuing if it states that it is your intention that the authority you give may be exercised during any future incapacity to manage property. NOTE: If you signed a valid Power of Attorney before The Substitute Decisions Act came into effect (or within six months thereafter), which says it is intended to continue notwithstanding later incapacity, it is DEEMED TO BE A CONTINUING POWER OF ATTORNEY.

If a Power of Attorney is not made before you become incapacitated, and if you are assessed to be incapable of managing your property, then the PUBLIC GUARDIAN AND TRUSTEE (the PGT) which is an Ontario government office, will become your statutory guardian of property. If you have a Continuing Power of Attorney, the statutory guardianship of the PGT will automatically terminate upon receipt of the PGT of a copy of the Power of Attorney and your attorney's written undertaking to act in accordance therewith. Where there is no Continuing Power of Attorney, the PGT can be replaced as statutory guardian on application made by a spouse, partner, child, parent, brother, sister or other relative of the incapable person. The applicant must file a management plan with the PGT and post a bond in an amount and form acceptable to the PGT.

UNINTENDED REVOCATION

It is important that you do nothing which would unintentionally revoke a General Power of Attorney. Since a subsequent Power of Attorney revokes any prior Power of Attorney, unless the subsequent Power of Attorney specifically states that it does not revoke the prior Power of Attorney, and also indicates that multiple Powers of Attorney are permitted, it is extremely important that you DO NOT AT A LATER DATE SIGN ANOTHER POWER OF ATTORNEY AT A BANK OR ELSEWHERE even for a limited purpose because it will revoke the Power of Attorney we have just created for you.

CAUTIONARY WARNING

It is my opinion that a Power of Attorney is to be signed after very careful consideration. A Power of Attorney is effective immediately upon it being signed. This would mean that your Attorney could sign a document on your behalf at any time, anywhere, without your knowledge or consent. If a Power of Attorney is given to a spouse or child, who at a later time becomes hostile, the Power of Attorney could be exercised to cause irreparable harm. The angry spouse or child holding the Power of Attorney could mortgage your home, sell the house, collapse your RRSP's, cash GIC's or close bank accounts. Although a Power of Attorney is revocable, any person who acts on the basis of a Power of Attorney which is produced by the Attorney and who does not have knowledge that the power has been revoked is entitled to rely on the authority of the person signing as the Attorney and is shielded from any liability. In other words, a bank lender acting on the basis of an apparent valid Power of Attorney is not liable to you if you suffer a loss as a result of a fraud or misdeeds of your attorney.

ALTERNATE ATTORNEY

It is also my strong recommendation that one should name an alternate attorney in the event of a named attorney being unavailable or incapacitated to act as your Attorney at the time of its activation. This individual should ideally be a close friend or family member within the general vicinity and should rarely be a professional adviser such as your Accountant or Lawyer due to the inherent costs of having such an individual being involved.

SAFEKEEPING

As a further limited precaution, many of the persons giving the Power of Attorney have directed that it would be held by myself to be released either upon direction from the maker of the Power of Attorney or upon receipt of some evidence (such as a doctor's letter) that the release of the Power of Attorney has become necessary as a result of the inability of the maker of the Power of Attorney to act for himself. I have made it clear that I would use reasonable care to make inquiries before releasing the Power of Attorney, but I could not assume and would not assume liability for the actions by the Attorney appointed by you.

GIFTS AND LOANS

An attorney for property may make charitable gifts for you if you are incapacitated and may make gifts or loans on your behalf provided certain conditions are met. Examples of such conditions are as follows:

I. The value of the property, the accustomed standard of living of the incapable person and his or dependence and the nature of all other legal obligations are taken into account and your property will remain sufficient to provide for such expenditures.

II. If you would have, if capable, made such gifts or loans. Note: Express instructions are best evidence of this and such instructions can be included in the Power of Attorney document where appropriate but should provide sufficient flexibility to adapt to changing circumstances.

That the gift or authorized gift does not create any legal dependency thereby giving rise to a possible claim for support from a death of the incapable person unless this is desired by you.

ACCESS TO THE INCAPABLE PERSON'S WILL

Your attorney must make reasonable efforts to determine whether you have a Will if you become incapacitated and if so, what the provisions of the Will are. You should therefore ensure that any person you appoint as an attorney is aware of where your Last Will and Testament is kept. Any person having custody or control of any property owned by you, including your Will, must provide the attorney with the information requested concerning the property or Will and deliver same to the attorney if requested to do so.

ANTI-ADEMPTION PROVISION

Once your attorney is aware of what is in your Will, the attorney may not dispose of property that he or she knows is the subject of a specific testamentary gift unless to do so is necessary to provide for your care.

COMPENSATION

Attorneys for property are entitled to compensation in accordance with a prescribed fee scale which allows for 2.5% on capital and income receipts and disbursements and 2/5 of 1% on the annual average value of the assets as a care management fee. You can increase or decrease this compensation. The compensation does not have
to be claimed by your attorney. An attorney who receives compensation is held to a higher standard of care than one who does not.

PERSONAL CARE POWER OF ATTORNEY

Ontario residents are now able to appoint a person to be responsible for Personal health care decision making.

For those who are concerned that the health care system will go to unreasonable efforts to prolong our lives, notwithstanding the prospects of a qualitative recovery, it is possible to appoint an attorney who presumably will be able to make medical decisions for you if you are unable (i.e. if you were incapacitated). The legislation goes beyond medical decisions and also allows you to specifically address food, shelter, clothing and other decisions.

DUTY OF PERSONAL CARE ATTORNEY

An attorney for personal care is required to explain his or her duties to an incapable person and to make decisions in accordance with the grantor's wishes or instructions expressed while he or she was capable. The attorney must attempt with reasonable diligence to ascertain what your wishes would be in certain circumstances and take these into account. Your attorney for personal care must take into consideration your values, beliefs and current wishes to the degree that they can be ascertained. You should therefore discuss your views and intentions with any person who you are considering appointing as your attorney for personal care. The Personal Care Power of Attorney allows your attorney to make treatment decisions for you during your incapacity where the health practitioner recommending treatment is of the opinion that you are incapable of making those decisions. Power of Attorney for Personal Care confers the authority to give or refuse consent to treatment.

AUTOMATIC REVOCATION OF PERSONAL CARE

As with the Power of Attorney for property, any new Power of Attorney for Personal Care will revoke an earlier one unless the later document provides for multiple Powers of Attorney for Personal Care. Since this may result in unintended revocation of a Power of Attorney for Personal Care, you should carefully consider any documents you are requested to sign. For example, if you subsequently sign a health care proxy authorizing and directing a named individual to refuse blood transactions or certain medical procedures on your behalf, it will constitute a Power of Attorney for Personal Care and would therefore revoke any earlier Power of Attorney.

CONCLUSION

Since our needs, wishes and values change over the course of our lifetime, it is unfortunately not sufficient to merely complete a one time Power of Attorney document. We must always be carefully considering the rights and obligations flowing with Powers of Attorney and clearly understand the terms and operation of The Substitute Decisions Act and seek proper and informed legal advice before signing any such document.

I trust this summary is a helpful one, and I would be pleased to answer any further questions you might have at your convenience.

Hopefully the above gives you a basic foundation as to those matters to be considered and we will undoubtedly be further discussing the same at our next opportunity. Please feel free to give me a call at your convenience.

Yours very truly,

Stuart W. Henderson

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