

# **PLANNING FOR THE FUTURE**

WILLS

PERSONAL DIRECTIVES

ENDURING POWERS OF ATTORNEY

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# PLANNING FOR THE FUTURE

In planning for the future you may wish to:

- Write a Will to plan for financial and personal matters after your death
- Write an Enduring Power of Attorney to plan for financial matters if you lose your mental capacity
- Write a Personal Directive to plan for personal matters in the event that you lose your mental capacity

# WILLS

## WHY SHOULD YOU HAVE A WILL?

- YOU CAN CHOOSE WHO WILL ADMINISTER YOUR ESTATE

The person you appoint to administer your estate is most often referred to as your “Personal Representative”. The Personal Representative may also be referred to as your “Executor”, if male, “Executrix”, if female, and “Trustee”,

If your spouse is the sole beneficiary of your estate, you may wish to name him or her as the primary Personal Representative. Depending upon your circumstances, one primary and an alternate Personal Representative will likely be sufficient. When deciding on a Personal Representative you may wish to choose someone who:

- is likely to live longer than you;
- you trust;
- is a resident of Alberta;
- is aware of what you want in the administration of your estate and is willing to carry out your wishes;
- is capable of managing his or her own financial and personal affairs and is relatively organized; and
- is aware of the nature and extent of your estate and the location of your assets.

We recommend that you ask your proposed Personal Representatives if they are prepared to act in the administration of your estate prior to preparing your Will.

- YOU CAN APPOINT A GUARDIAN FOR YOUR MINOR CHILDREN

The Courts are not bound to accept the guardians appointed in your Will, however, the wishes of the parent are generally respected. In the matter of guardianship, the Courts consider the best interests of the children.

- YOU CAN DECIDE WHO WILL BENEFIT FROM YOUR ESTATE

Your Will sets out the details of who will benefit from your estate. You can make specific bequests, include a direction for your Personal Representative to distribute specific items in accordance with a memorandum that you have prepared or will prepare at a later date or deal with all your property in more general terms. You can also designate when beneficiaries will receive their share of your estate.

- **YOU CAN MAXIMIZE THE INHERITANCE YOUR BENEFICIARIES WILL RECEIVE**

With a Will you can prevent the untimely liquidation of your estate. If you have no Will, or your Will does not address this issue, the law requires that your property be disposed of and distributed in a timely fashion. In order to preserve their value, it may be necessary to maintain certain assets in your estate in their current form. You may wish to make a provision in your Will to give your Trustee the power to maintain your assets in the form in which they are at the time of your death and to convert them to cash when your estate will benefit the most from the conversion. Likewise, if you have a business, you may want to give your Trustee the power to continue to operate the business until it is advantageous to convert your shares, or to sell the assets.

### **WHAT CAN I DO TO REDUCE THE RISK THAT MY WILL MAY BE SUCCESSFULLY CHALLENGED?**

- **ENSURE THAT YOU PROVIDE FOR YOUR DEPENDANTS**

Your Will should provide for the proper maintenance and support of your dependents. If it does not, the Courts, upon the application of one or more of your dependents may overturn your Will.

Divorced persons may be subject to settlement agreements and court orders regarding the maintenance and support of a spouse and children. Many times these obligations survive the death of the divorced person. It is important that your Will incorporates these obligations.

- **MAKE YOUR WILL WHILE YOU HAVE THE MENTAL CAPACITY**

The longer you wait to make your Will the greater the risk that you could be a victim of brain disease, stroke or suffer impairment to your cognitive functions. Do not risk having your Will challenged on the basis that you did not have the mental capacity to understand the nature and effect of your Will.

### **HOW OFTEN SHOULD I REVIEW MY WILL?**

You should review your existing Will every 5 to 10 years and anytime there are any significant changes in your life, such as the birth or death of a family member, the death of a named beneficiary, guardian or Personal Representative, or the acquisition or disposition of property or a business.

# PERSONAL DIRECTIVES

## WHAT IS A PERSONAL DIRECTIVE?

A Personal Directive is a document which allows you to appoint another person (referred to as an “Agent”) to make personal decisions for you when you lack the mental capacity to make your own decisions. It can also contain specific instructions for the matters you care most about to guide your Agent or professional service providers in making decisions on your behalf.

## WHY IS IT BENEFICIAL TO HAVE A PERSONAL DIRECTIVE?

A Personal Directive is a relatively inexpensive way to plan for your own incapacity. Without a Personal Directive, if you become mentally incapacitated it may be necessary for your family to make an application under the *Dependent Adults Act* for an Order appointing a guardian to make personal decisions on your behalf. This application is costly and can take several months.

## WHO CAN I NAME AS MY AGENT

Your agent must be eighteen years of age or older at the time the Personal Directive takes effect. Being an Agent can take a lot of time so you should discuss your decision with the person you wish to appoint as your Agent. You can appoint more than one Agent. You can give these Agents the authority in the same or different areas. If you appoint more than one Agent it is very important to clearly state when each is to act and how any disagreement should be resolved. You can also appoint an Agent and an alternate Agent, however, it is important to clearly specify the situations in which the alternate Agent would make decisions (ie. the alternate may be asked to make decisions only if the Agent is out of the country, ill or deceased).

## WHAT DECISIONS CAN MY AGENT MAKE ON MY BEHALF?

Unless you specify otherwise in your Personal Directive, your Agent will have the authority to make decisions with respect to any non-financial matters including:

- health care
- accommodation
- with whom a person may live and associate
- participation in social, educational and employment activities
- any non-financial legal matters such as providing consent for the release of medical records

The only exceptions to this rule are:

- psychosurgery as defined in the *Mental Health Act*
- Sterilization that is not medically necessary to protect your health
- removal of tissue for implantation in the body of another living person or for medical education or research purposes
- participation in research or experimental activities, if the participation offers little or no potential benefit for you

If you wish your Agent to make decisions related to these matters, you must specifically state this is your Personal Directive.

Additionally, your Personal Directive cannot include instructions relating to aided suicide, euthanasia or other instructions prohibited by law. If a Personal Directive contains an instruction that is prohibited by law, that instruction is void.

### **WHEN DOES MY PERSONAL DIRECTIVE COME INTO EFFECT?**

A Personal Directive comes into effect when an individual lacks the capacity to make decisions for himself. Mental capacity can be determined by either the person or persons named in the Personal Directive to assess capacity, after consulting with a physician or psychologist, or by two service providers, at least one of whom is a physician or psychologist.

When the determination of mental incapacity has been made the Agent must then notify the person's nearest relative and his or her legal representative, if any. The maker of the Personal Directive can also specify other individuals who are to be notified, or not notified.

Unless you state otherwise in your Personal Directive, it remains in effect until you revoke it, the Court revokes it, or you die. You can revoke your Personal Directive only if you have the mental capacity to understand what you are doing.

### **HOW CAN I ENSURE THAT MY PERSONAL DIRECTIVE IS IMPLEMENTED**

It is a good idea to discuss your intentions with respect to your Personal Directive with those people closest to you. Your Agent should have a copy of your Personal Directive soon after you make it. This gives your agent a chance to review the Personal Directive periodically and raise questions about what your wishes would be in certain circumstances. If your Personal Directive is specific about a circumstance (ie. a medical treatment) you may wish to leave a copy with your physician. You may also wish to leave copies with your family members, lawyer and minister.

Another idea is to keep a card in your wallet or purse which states that you have a Personal Directive, where it can be found, and how to contact your Agent.

# ENDURING POWERS OF ATTORNEY

## WHAT IS AN ENDURING POWER OF ATTORNEY?

A Power of Attorney is a document which allows a person to appoint another person, (referred to as an "Attorney") to handle **financial** matters. The person making the Power of Attorney is referred to as a "Donor". Until June, 1991, a Power of Attorney was only valid as long as the Donor was mentally competent. In June 1991, the provincial government legislated a new type of Power of Attorney which provided for the powers of the Attorney to endure past the time the Donor became incompetent. The "Enduring" Power of Attorney allows the Donor to plan for his or her own incapacity.

## WHO CAN MAKE AN ENDURING POWER OF ATTORNEY?

If you are mentally competent and at least eighteen years of age you can make an Enduring Power of Attorney.

## WHY SHOULD I HAVE AN ENDURING POWER OF ATTORNEY?

An Enduring Power of Attorney can provide you with a relatively simple and straightforward means of planning for your own incapacity. It allows you the ability to personally select a trustworthy individual or individuals (your "Attorney") to manage your financial affairs and protect your interests should you become mentally incapacitated. In the absence of an Enduring Power of Attorney the procedures necessary to deal with your property can become unnecessarily complex and expensive. Without an Enduring Power of Attorney, often the only option available to the family and friends of a person who has lost his or her capacity is to make an application under the *Adult Guardianship and Trusteeship Act*. This application requests an Order from the Court that, among other things, authorizes the person making the application to handle the financial (and in some cases the personal) affairs of the mentally incompetent individual. This process is costly and can take several months.

## WHEN DOES MY ENDURING POWER OF ATTORNEY COME INTO EFFECT?

You specify in your Enduring Power of Attorney when it will come into effect. Your Enduring Power of Attorney can come into effect immediately or you can choose to have a "Springing" Enduring Power of Attorney.

A Springing Enduring Power of Attorney will come into effect only when you are infirm, physically incapable of handling, or mentally incapable of making reasonable judgments in respect to your financial affairs. The written declaration of two physicians would be required to bring the Springing Enduring Power of Attorney into effect.

### **WHAT POWERS WILL MY ATTORNEY HAVE?**

Unless you state otherwise in the Enduring Power of Attorney, your Attorney will have very wide powers to deal with all matters pertaining to your assets.

### **CAN I CANCEL MY ENDURING POWER OF ATTORNEY?**

You may cancel your Enduring Power of Attorney at any time as long as you have the mental capacity to understand what you are doing. A Power of Attorney also comes to an end when either the Donor or the Attorney dies.