

Planning Ahead



DUNNING PLACE



Ministry of
Justice and
Attorney General

Planning Ahead

There are times in our lives when we may lose the ability to make decisions for ourselves. At those times, someone else (a substitute) has to make decisions for us. This can happen because of events totally beyond our control. For example, it happens if you are injured in a serious accident and you are unconscious. It also happens if you lose mental capacity and of course it happens when you die.

This booklet suggests what decisions you should make and what documents you should prepare ahead of time, just in case.. You can prepare those documents yourself or you can contact your lawyer to discuss preparing them for you. Remember, when you sign these documents you are appointing someone to make decisions for you only when you cannot. These persons are usually referred to as substitute decision-makers.

In another booklet, “Substitute Decision Making – A Framework”, the Public Guardian and Trustee (PGT) sets out a framework for substitute decision making. It indicates who can make decisions for you, what legislation applies and how a substitute decision-maker is appointed. That booklet is available from the PGT office or website.

Incapacity can happen in a variety of ways, and it’s important to plan ahead – just in case. While you are capable, you can do certain things to control who makes decisions for you, if you become incapable. You can:

- sign a power of attorney and appoint a property attorney, personal attorney or both;
- sign a health care directive (advanced care directive), express your wishes and appoint a proxy;
- make a will and appoint an executor.

It is recommended that you consider preparing all three.

If you do not do these things, the following may happen:

- the Court appoints a property guardian, personal guardian or both;
- the PGT becomes your property guardian;
- your next of kin or two doctors make medical decisions for you;
- the Court appoints an administrator to look after your estate after you die.

The persons making those decisions may not be the ones you want and could even be persons you do not like or trust. By preparing powers of attorney, health care directives and wills, you retain control over who will make decisions for you when you are incapable. It is better to plan ahead.

By planning and signing a power of attorney, a health care directive and a will, you can control who will act for you, when they begin to act, provide them with your wishes and require them to account to others.

1. Power of Attorney

You can:

- appoint an attorney (one, two or three persons) to act for you for property matters, personal matters or both;
- appoint the same person as your personal attorney and property attorney or appoint different persons;
- specify that the attorney has power even after you lose capacity to make your own decisions. This is called an enduring power of attorney;
- indicate that your attorney only has power when you lose capacity as determined by someone like your family doctor. This is called a contingent enduring power of attorney;
- specify when and how the attorney should account to you and your family;
- give your attorney broad or limited powers to make financial or personal decisions;
- impose conditions or requirements on the attorney;
- express your wishes and desires in the power of attorney document.

The Powers of Attorney Act sets out limitations on who may act as attorney, the attorney's duties (not in detail) and the requirements for signing a power of attorney.

The regulations under the *Act* contain an enduring power of attorney form. You do not have to use this form but it is a good guide to follow.

The PGT has published “Duties and Powers of a Property Attorney in Saskatchewan”, “Minimizing the Risk of Financial Abuse When You Appoint an Attorney”, and “Accountings.” These booklets are available from the PGT office or website.

2. Health Care Directives

A health care directive is a document that gives directions about medical treatment to be used by health care professionals when you are not capable of giving directions. It is sometimes called an advanced care directive or a living will. It comes into effect when you are not able to make and communicate your own health care decisions. You can give directions regarding treatment, e.g. “Do not resuscitate”.

You can also appoint a proxy. This is an important appointment. Your wording in a health care directive cannot anticipate all things that might happen to you as you get older. Your proxy will have to make these medical decisions for you. Therefore, your proxy should be someone you trust.

Depending on what happens to you, the proxy might have to make some very difficult decisions. You can assist by expressing your wishes and desires in a general way and indicating things that you definitely do not want to be done. Even when you do that, circumstances may change and the proxy will have to make decisions without knowing your wishes.

You can find samples of a health care directive on the Internet. Most health regions have a form called “advanced care directive.” Whatever form you use, it should be tailored to your specific circumstances. To assist you, the PGT has published a booklet “Health Care Directives” which is available from the PGT office or website.

3. A Will

Everyone should make a will. Your will directs how property is to be distributed upon your death. In your will, you will appoint an executor, or two or three, and an alternate. You should appoint those that you trust. Your executor should be prepared to provide an accounting of his or her actions to any beneficiary under the will. To understand what an executor should do in administering an estate, refer to the booklet, “If You are Considering Administering a Deceased Estate” available from the PGT office or website.

Once you die, the executor appointed under your will has the authority to act. They are expected to follow the law and the will.

The executor gets power from the will so it is important to put all your directions, wishes and desires in the will. You will need to set out:

- Who you appoint as your executor or executors;
- Your alternate executor in case the first executor cannot act;
- Who is to receive your property and any special instructions regarding personal property like antiques, heirlooms, coin collections, stamp collections, art work, or anything that is special to you;
- Any specific gifts of cash or things to grandchildren, nieces, nephews, brothers, sisters or friends;
- Any gifts are to be held in trust until someone reaches a certain age, e.g. 18, 21, 25, etc...

You can also indicate who gets a gift if your first choice of recipient dies. For example you can give property to your spouse, but if he or she dies, then indicate that it goes to your children. You can give property to a child of yours, but if he or she dies, you can indicate that it goes to his or her children.

You should contact a lawyer and ask him or her to prepare your will. If you do not want to hire a lawyer, you can write your own will. However, you should educate yourself on the legal requirements of a will before you begin. A good place to start is by reading the “Wills and Estates” pamphlet published by the Public Legal Education Association (PLEA). You can find it at your local library or on PLEA’s website at www.plea.org.

Do I need all three documents?

It is difficult to say whether or not you need all three, a power of attorney, a health care directive and a will but it is really wise to prepare all three. If you are using a lawyer you should consider asking him or her to prepare all three and ask what his or her fees are to prepare all three.

After I prepare the documents

After you have the three documents prepared, you should put the originals in a safe but accessible place. At some point your attorney, proxy or executor will need the original. You should advise them that they are appointed and where the original document is. You might consider giving them a copy so they know what is required of them.

You do not have to get their consent to act but it is wise to ask them in advance whether they will act. It would be unfortunate to appoint an attorney and find out after you are incapable that he or she does not want to act.

Can they charge fees?

An attorney and an executor can charge fees. It is less likely that a proxy would charge a fee but if the position involved a lot of work and many trips to the hospital, it might be reasonable for the proxy to charge a fee. Many sons and daughters are prepared to do these things for no charge but you should seriously consider whether in your power of attorney, will or health care directive you wish to provide for a fee.

Being an attorney under a power of attorney can be a lot of work. It can take many hours. You may be burdening one or two of your children by asking them to do this for you. It might be reasonable to indicate in the power of attorney that they can charge a fee (a percentage or an hourly rate). The same thinking applies to an executor.

Can I require accountings?

On the property side, you should indicate in your power of attorney and your will your expectations regarding whether or not your attorney or executor must account to your family or beneficiaries. It is generally wise to allow someone you trust to request an accounting. There are certain laws that require attorneys and executors to account in certain circumstances. It might be wise to require them to account to all family members or beneficiaries. "All family members" can mean all sons and daughters or, if you wish, a broader group. When attorneys or executors are not open with information, this tends to generate suspicion on the part of others. This suspicion then affects relationships and can deteriorate into family disputes.

How many should I appoint?

You can appoint one or more attorneys, proxies or executors. Depending on family dynamics, you can appoint two or three of your children to look after your affairs. Keep in mind, the more people you appoint the more coordination it takes to make a decision. But appointing more than one person also has the effect of keeping more people informed and reduces the risk of one person making a mistake or doing something inappropriate.

Can I change my mind?

You can change your mind on your appointments and the contents of your will, power of attorney or health care directive. If necessary, you should review these documents once a year and make any necessary changes. You can do this by re-writing the documents or contacting your lawyer to re-do them. It is not wise to make changes by making hand written notes in the margins of the documents. Those handwritten changes can lead to different interpretations of your intent, confusion, family disputes and lawsuits.

This booklet is intended to give you a framework for planning ahead while you have capacity. If you would like more information, you can check out the PGT website. If you require more information than is on the PGT website, you may wish to contact a lawyer.

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