

# WHO WILL SPEAK FOR YOU? Incapacity Planning And Wills The ABC's

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# SESSION IS FOR INFORMATION PURPOSE ONLY

- ▶ It must not be relied on as legal advice.
  - ▶ You must seek legal advice about particular circumstances.

# ADVOCACY NORTH FOR ELDERS AND SENIORS

- ▶ **Advocacy North** is a collaborative effort of all 11 Northern Community Legal Clinics (Muskoka to Moosonee to Kenora), in the area of Elder and Seniors Law.

## Areas of law

- ▶ POA (personal care/property)
- ▶ Consent and Capacity
- ▶ Long-term care homes
- ▶ Elder Abuse
- ▶ Consumer-protection

# HOW IS A POWER OF ATTORNEY DIFFERENT FROM A WILL?

- ▶ Envision a timeline - before vs after death
- ▶ A POA is used to protect your wishes while you are still alive.
- ▶ A Will is used to protect your wishes after you've passed away.
- ▶ Both legal documents are important and useful in their own ways, but these terms shouldn't be used interchangeably as they serve two very different purposes.

# WHAT YOU NEED TO KNOW about incapacity planning

- ▶ What is a Power of Attorney & a Substitute Decision Maker?
- ▶ Different types of POAs & other substitute decision making authorities.
- ▶ Why you may want/do not want to prepare a POA?
- ▶ **When a POA comes into effect and why? Who decides that a person is now incapable?**
- ▶ What happens if you haven't prepared a POA?
- ▶ The role and legal responsibilities of the attorney named in a POA.
- ▶ Tips and pitfalls on choosing the right person.
- ▶ Living wills and advance directives.

# LEGISLATION RELATING TO INCAPACITY

## STATUTORY FRAMEWORK

- ▶ *SUBSTITUTE DECISIONS ACT*
- ▶ *HEALTH CARE CONSENT ACT*

# WHO DECIDES?

- ▶ You decide for yourself if **MENTALLY CAPABLE**.
- ▶ Your Substitute Decision Maker (SDM) if you are **NOT** mentally capable.

# MENTAL CAPACITY IN LAW

- ▶ Mental capacity in law is ISSUE or TASK specific.
- ▶ A person is incapable in respect to a particular type of decision.
- ▶ Seniors should not be labelled as globally incapable.
- ▶ A Senior can be “mentally ill” and yet still be “mentally capable”.



# CAPACITY

- ▶ **ABILITY** to understand the information that is relevant to the decision to be made

**AND**

- ▶ **ABILITY** to appreciate the reasonably foreseeable consequences of a decision or lack of decision

# TO UNDERSTAND AND TO APPRECIATE - What does it mean?

- ▶ It is NOT a clinical condition or diagnosis.
- ▶ Must have the cognitive ability to remember the general information given regarding the proposed treatment.
- ▶ Must have the ability to weigh the information in the context of his or her life circumstances (Mental process requiring analysis)
- ▶ In addition to memory, this requires the ability to reason and to make decisions.

# PROPERTY DECISIONS

## THE ABC'S

# Who is your SDM for Property if you are not mentally capable for property decisions?

- ▶ Someone you choose as an “attorney” in a POA Property when you are still mentally capable.
- ▶ Or after you become incapable
  - ▶ A Statutory Guardian for Property
  - ▶ A Court Ordered Guardian of Property
  - ▶ A Trustee appointed under the OAS or CPP legislation

# POWERS OF ATTORNEY FOR PROPERTY

- ▶ You can choose the person you want to act for you by signing a POA Property.
- ▶ You must be mentally Capable AND acting voluntarily.
- ▶ POA for Property is a DOCUMENT in which you name an SDM (called an “attorney”), that you and two witnesses sign, all in the presence of each other.

# IMPORTANT things to remember before signing a POA for Property

- ▶ Think about whether you need one or not - POAs for property are NOT the best things for everyone.
- ▶ You should ONLY name someone as attorney if you have someone that you TRUST and think that you will be able to trust in the future. The person must also be capable of fulfilling the duties.
- ▶ If you don't have someone you can trust - DON'T SIGN A POA PROPERTY

# IMPORTANT things to remember before signing a POA for Property

- ▶ The person who you name as attorney in a POA will have the ability to “sign your name” - so think about what that means.
- You can sell your house by signing your name.. You can enter into contracts by signing your name.. You can have a mortgage put on your house by signing your name... you can access your bank accounts by signing your name. Therefore, so can your attorney.
- Should you name more than one person as your attorney? Should they act together (jointly) or jointly and severally (separately) ?

# WHEN DOES A POA FOR PROPERTY IN EFFECT?

- ▶ Comes into effect ON SIGNATURE when you are still mentally capable
- ▶ If you write into the POA Property that you only want it to be in effect AFTER you become incapable, then your attorney (SDM) can use POA Property ONLY after you become incapable



# Who is your SDM for Property if incapable and don't have a POA

## Property - Statutory Guardianship

- ▶ If you don't have a POA property and you are likely mentally incapable to manage property, someone can arrange for you to be assessed by a “Capacity Assessor” and if found incapable for property, the OPGT will take over your money management for you and act as your SDM for property. This is called a **Statutory Guardianship**.

# APPLICATION TO REPLACE THE OPGT AS STATUTORY GUARDIAN

- ▶ Your spouse or partner, your relatives, or a trust company (with consent of your spouse or partner) may apply to replace the OPGT as your statutory guardian and take over management of your property.

# CAPACITY ASSESSORS

- Capacity assessors are fee for service hiring- whoever asks for the assessment, pays for the assessment.
- You can get information about who are capacity assessors and how to find them by contacting the Capacity Assessment Office located in the same Office of the Public Guardian and Trustee.

# Who is your SDM for Property if you are not mentally capable without a POA Property and are an psychiatric inpatient?

- ▶ If you are admitted as an inpatient to a hospital for psychiatric treatment, a physician must assess you as to whether you are mentally capable to manage property.
- ▶ If you are found incapable, the OPGT will step in as your SDM for property (called a Statutory Guardianship).

# Who is your SDM for Property if you are not mentally capable and don't have a POA Property - Court Ordered Guardian

- ▶ Someone, usually a close relative, can apply to court to be named your Guardian of Property- but other people also could apply to become your court ordered Guardian.

# Who is your SDM for Property if you are incapable and don't have a POA Property - Trusteeship

- If you have income only from Canada Pension and Old Age Security, and you become incapable for property and have no POA property, someone can apply to become your TRUSTEE to manage your money for you.
- Application forms for this are available from Service Canada (Income Security Branch) – These are a certificate of Incapability and an Undertaking.

# PERSONAL CARE AND TREATMENT DECISIONS

## THE ABC'S

# Health Care vs. Personal Care decisions

Health care (see Health Care Consent Act)

- ▶ Capacity to make a **treatment** decision or decision about plan of care/treatment
- ▶ Capacity to make decision about **admission to long term care home**

Personal care (other than Health Care) (see Substitute Decision Act)

- ▶ Capacity to make decisions about **where to live (shelter)** including decisions about moving into a retirement home
- ▶ Capacity to make decision about **risk/safety, nutrition, clothing and hygiene**



# WHO IS YOUR SDM FOR PERSONAL CARE IF YOU BECOME INCAPABLE ?

- ▶ Either someone you choose in a POA Personal Care or
- ▶ A Court Ordered Guardian of the Person or
- ▶ For health decisions - the person or persons highest ranking in the hierarchy of SDMs in the Health Care Consent Act.

A person is *presumed to be capable* with respect to medical treatment unless reasonable grounds to suspect incapacity exist.

# CAPACITY FOR HEALTH CARE DECISIONS

S. 15 of the *Health Care Consent Act*

- ▶ A person may be capable in respect some treatments and incapable in respect to others.
- ▶ A person may be incapable with respect to treatment at one time but capable at another time.

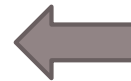
# LEGAL DEFINITION OF CAPACITY FOR PERSONAL CARE DECISIONS

S. 45 of the *Substitute Decisions Act*

- ▶ These are decisions about health care, shelter, clothing, nutrition, hygiene and safety

A person is incapable of personal care if the person is not able to

a) “understand” the information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety OR



b) is not able to “appreciate” the reasonably foreseeable consequences of a decision or lack of decision

# Who is your SDM after you become incapable for Personal Care?

- You can prepare a POA Personal Care to choose someone to act for you.
- POA Personal Care – is a document, in which you name someone (or more than one person) to be your attorney for personal care. You can also write in that document your wishes about health care and treatment. That document must be signed by you and two witnesses in the presence of each other.

# IMPORTANT THINGS to think about before signing a POA for Personal Care

- Do you need a POA Personal Care? Why?
- Do you have someone that you can trust to name as attorney- remember that this persons will be able to make decisions about where you LIVE, what HEALTH CARE you will get or won't get, what food you eat and clothes you wear and how your hygiene is maintained and what risks you can take...

# WHEN DOES A POA FOR PERSONAL CARE Come into Effect?

- A POA Personal Care is different than a POA Property as to when it comes into effect.
- A POA Personal Care ONLY comes into effect and gives authority to your SDM to make decisions for you when you are not mentally capable for personal care decisions.

# Who is your SDM if you are not mentally capable to make Health Decisions?

- ▶ You ALWAYS have an SDM for Health Care even if you have not done a POA Personal Care.
- ▶ Your SDM is the person HIGHEST on the list of SDMs in the Health Care Consent Act.



# LIST OF SDMS FOR HEALTH CARE Hierachy

1. Court Ordered Guardian of the Person
2. Attorney in a Power of Attorney for Personal care
3. Representative ( person appointed by the Consent and Capacity Board)
4. Your spouse or partner
5. Your Child or parent
6. Your Brothers or sisters
7. Any of your other relatives
8. The Public Guardian and Trustee

# LIST OF SDMS FOR HEALTH CARE

- ▶ If you have more than one person in the same category that is available to act for you as SDM, then all of them must act together and agree or they may pick one of the group to act for you - so if you have three children all three may act for you or they must choose which one will act for you - THEY must agree in some way as to what the decision is for you and how many of them are “active” in the decision making. Health providers cannot pick which of them that may act for you.

# REQUIREMENTS FOR A PERSON TO BE AN SDM for PC

Person highest in hierarchy may give or refuse consent only if he or she:

- ▶ a) is capable in respect to the treatment
- ▶ b) is at least 16 years old unless the parent of the incapable person
- ▶ c) is not prohibited by a court order or separation agreement from acting as SDM
- ▶ d) is available
- ▶ e) is willing to act as SDM

# DEFINITION OF SPOUSE

- ▶ Two persons (same sex or opposite sex) who are
  - (a) married to each other; or
  - (b) living common law and,
    - i) have cohabited for at least one year, or
    - ii) are together the parents of a child, or
    - iii) have together entered into a cohabitation agreement under s. 53 of the *Family Law Act*.

Not spouses if living separate and apart as a result of a breakdown of their relationship

# OTHER DEFINITIONS

- ▶ **PARTNER**

Two persons who have lived for at least one year and have a close personal relationship that is of primary importance in both person's lives

- ▶ **RELATIVE**

People are relatives if related by blood, marriage or adoption

# What's the difference between a POA Personal Care and an “Advance Directive” or Living Will?

- ▶ The Ontario legislation ONLY refers to POAs for personal care and to the ability of people to express “wishes” about future health care.
- ▶ There is no reference to advance directives or living wills.
- ▶ You cannot validly appoint someone as your decision maker in an advance directive - You can only do that in a valid POA Personal Care.

# HOW DO YOU GET A POA FOR PERSONAL CARE DONE?

- ▶ How do you get a POA Personal Care done?
  - use Ontario Public Guardian and Trustee Kit
  - Consult a lawyer or your local legal clinic

# DNR AND MAID (Medical assistance in dying)

- ▶ **Do Not Resuscitate** Confirmation Form to Paramedics and Firefighters (form 4519-45) signed by medical staff vs. Hospital directives.
- ▶ Individuals may access medical assistance in dying in Ontario if 18 years or older, capable of making health care decisions, have a grievous and irremediable medical condition i.e. the patient has a serious and incurable illness, disease or disability, and the patient is in an advanced state of irreversible decline in capabilities, and the patient is enduring physical or psychological suffering, caused by the medical condition or the state of decline, that is intolerable to the person, and the patient's natural death has become reasonably foreseeable;
- ▶ Must make a voluntary witnessed request and undergo two assessments.



# Summary

- ▶ Capable people make their own decisions.
- ▶ While capable, a person may prepare POAS to appoint someone to be their future SDM.
- ▶ If incapable, everyone automatically has an SDM for health care even if they didn't do a POA because of the HCCA.
- ▶ If person incapable, someone else would have to DO something to become the SDM for property of that person if that person had not done a POA property while capable.

# WILLS

## Overview

# WILLS OVERVIEW

## 6 REASONS YOU NEED A WILL

- ▶ You can decide who will manage your Estate.
- ▶ You can appoint Guardians for minor children and protect vulnerable & disabled beneficiaries.
- ▶ You can choose your beneficiaries.
- ▶ You can decide When and How much of your Estate is given to your children.
- ▶ Avoid that your Estate Trustee needs a surety bond.
- ▶ Estate planning and Probate avoidance.

# IS YOUR WILL OUT OF DATE?

As a general rule, your will should be reviewed every 3 to 5 years.

- ▶ Why should you revise your will?
  - ▶ 1) You have gotten married, separated or divorced or started a common-law relationship.
  - ▶ 2) Someone in your will has died, separated or new beneficiaries have been born or your Estate Trustee's situation has changed.
  - ▶ 3) Your assets have increased or decreased significantly or you want to change your bequests.

# TITBITS ABOUT SPOUSES

- ▶ A will made prior to marriage will be automatically revoked by your marriage unless your will was made in “contemplation of marriage”.
- ▶ Unlike marriage, your will is NOT automatically revoked following a divorce. Only the parts of the will concerning your former spouse are revoked. This means that they can no longer be your Estate Trustee and any gifts typically pass to other beneficiaries. This can lead to messy/contested situations.
- ▶ Wills are unaffected by a separation even if that separation has lasted for years and both partners have moved on. Until an official divorce is filed, the will is entirely valid.

# HEADS UP ON “SHACKING” UP

- ▶ A common law partner does not fall under the definition of spouse and is NOT entitled to any share of the deceased partner’s estate if he or she dies without a will.
- ▶ However, the surviving partner may have a support claim and a possible legal claim, not under legislation, but under equitable doctrines to a share of property, if there is no domestic contract.
- ▶ After death, the surviving partner does not have existing legal rights under legislation to continue to live in the property and no automatic rights to receive any funds from the estate to help pay expenses.

# WILLS AND CHILDREN

- ▶ If you do not want to leave a share to one child, you should specify why you are disinheriting this child to avoid that a court rules that you did so by accident.
- ▶ A step child is not considered your legal child and they will be excluded from gifts to “all my children”.
- ▶ If you have custody of grandchildren, consider whether you need to appoint a Guardian in your will.
- ▶ Consider that your Estate trustee will manage the assets you have left to minor children or grandchildren. Consider what age you want them to gain full control of their inheritance, depending on personality and maturity of the child and the sum and form of the inheritance.

# THE END