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Wills, Enduring Guardianship, Powers of Attorney

Giving Someone Else the Right to Deal With Your Care, Property or Finances

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There are a number of legal steps that you can take to ensure that you are cared for according to your wishes in the event that you lose the capacity to make decisions for yourself, and to ensure that your property is distributed following your instructions when you die.

These legal options mean that you are giving someone else the right to deal with your care, property or finances. Therefore, it is very important that you get advice and carefully consider the possible consequences of giving such an important power to another person or persons.

For Transgender people there are additional matters to take into account.

Most often, when a person is at risk of not being able to care for themselves, a relative or spouse takes on care or decision making functions. However, for many transgender people, relations with family are amongst the most problematic and it is not difficult to imagine situations in which, if family members are placed in a position to control property or make life decisions, it is possible they can use that control in ways which you would not wish it to be used. For example, an Enduring Guardian who has control over medical treatment could stop hormone therapy, or an Executor could choose to bury an M.T.F. transwoman as "Our Loving Father" or an F.T.M. transman as "Our Devoted Mother".

So lets have a look at the legal mechanisms that you can put in place to ensure, as far as you can, that you are best looked after as you would wish to be if something goes wrong or you lose capacity for some reason.

We shall also look at how to make sure your property will be distributed as you wish after you die. Let's start with that topic.

Wills

What is a will?

A will is a formal document that expresses what you have decided to have happen with your property when you die.

If you die without a will, you be considered to have died "intestate", which means your property is to be distributed according to a legal formula among family members, which may be against your wishes. Again for transgendered people, this may be the last thing you wanted, if relationships with some family members have been fractured.

How do I make a will?

You are able to make a will yourself. However, you must ensure that the will is:

- Properly written;
- properly signed; and
- properly witnessed.

If your will lacks any of the above it may mean that you are intestate and may cause problems for those left behind.

It is best to seek legal advice. A lawyer will be able to assist you in making sure your wishes are properly expressed, and give advice you might need about any issues that arise in your particular circumstances.

The effect of a will

In your will, you can:

- Put specific directions or gifts into the will;
- appoint someone to care for children under eighteen;
- request what you would like at your funeral (although note your instructions cannot be compelled);
- set up a trust.

You will also appoint an executor, who is a person that will look after your property after you die and administer the will. The Executor effectively has the authority (subject to the terms of the will) to deal with all your affairs after you die, including your funeral arrangements. You must ensure the person is someone you know and trust. If you do not have a relative or a friend who is able to do

this, you can appoint a professional trustee, such as a trust company, or solicitor, to undertake this role.

While such a person will be required to be paid, they don't have an emotional investment in how you or your affairs are dealt with after you die.

If you have already made a will, it is important to change your will when:

- you begin a new relationship;
- you end a relationship;
- with the birth of children;
- with any other significant change in life circumstances.

It is important to note that if you have any existing debts upon your death, they will be paid out of your estate.

Also, if you have unclaimed superannuation money, it may not be compulsory for your superannuation fund to pay this according to any directive you may leave. Different funds have different terms in the Trust Deed which determine the issue of superannuation on death. It is recommended that you seek legal advice about this matter.

Challenging a will

If you do not make proper provision for your spouse and/or children, they may be able to challenge the will under the family provision laws. It is recommended that you seek legal advice on how this may affect your will.

That's all about when you are gone - what about while you are still here, but not able to look after your affairs?

Enduring Guardianship

What is an enduring guardian?

An enduring guardian is a person you can appoint to make personal decisions on your behalf, if you lose capacity to make decisions. Personal decisions include:

- where you live;
- what medical treatments you receive;
- what services you receive.

How to appoint an enduring guardian

To appoint an enduring guardian, you must be at least eighteen years old, and you must be able to understand the nature and effect of the appointment. You should appoint someone who you know and trust.

To appoint an enduring guardian, you must sign a form of appointment. You can appoint one or more enduring guardians. You can appoint them so they act only together, or act independently. The form must be witnessed by specific persons, in the normal case a lawyer, who has advised of the consequences of the appointment.

There is no requirement for you to lodge the document, but it should be kept in a safe place and you should give a copy to your enduring guardian.

What the enduring guardian can and cannot do

An enduring guardian can make the following decisions:

- accommodation;
- health care;
- what services you will receive;
- consent to medical and dental treatment that will promote your health and wellbeing;
- "access function" - who you see;
- restrictive practices function - in order to protect from self-harm;
- directions about how to receive treatment - for example, whether to stay with the current doctor.

An enduring guardian is empowered in some decision making areas, but they are not empowered to make specific decisions.

An enduring guardian cannot:

- make decisions that are against the law;
- make or alter a will;
- vote or consent to marriage;
- consent to treatment if you object.

When does an enduring guardianship begin?

An enduring guardian can start making decisions for you when you lose capacity. A medical certificate can be provided to prove that

you have lost capacity, or it is possible for the enduring guardian to apply to the Guardianship Tribunal for an order to establish that you have lost capacity.

The enduring guardian is not supervised in the exercise of his/her powers. If, however, someone is concerned for your welfare, he/she can apply to the Guardianship Tribunal for a review of the guardianship.

Enduring guardianships and Advance Directives

An advance directive is different from enduring guardianship.

An enduring guardian is the legal appointment of a person who can make decisions on your behalf. An advanced directive is a document that sets out your wishes about future medical treatment if you lose the capacity to make these decisions for yourself. Such a directive can be included in the appointment of an enduring guardian.

An advance directive is legally binding if it:

- is current;
- relates to future illness or condition; and
- is completed before the loss of your capacity to prepare the document.

How does an enduring guardianship end?

An enduring guardianship can end if:

- The enduring guardianship is revoked (but, of course this can only be done by you before you have lost capacity or have regained capacity);
- The enduring guardian dies;
- The enduring guardian resigns; or
- If the guardianship is reviewed by the Guardianship Tribunal or the Supreme Court and is terminated.

Consents to Medical Treatments

Medical and dental practitioners must obtain consent before providing any treatment. That is fine if you are in a position to know and understand what the procedure is and its risks. However, if you have suffered a trauma, you may not be in that position.

Equally, if you have otherwise lost capacity, you will not be able to give consent. A person responsible is someone who is able to consent to medical treatments in the event that you are not capable of consenting to your own treatment.

A person responsible is:

- A guardian, or if you have no guardian;
- the most recent spouse or de facto, including same-sex partners; or
- unpaid carer; or
- relative or friend with whom you have a close personal relationship.

Rights of a "person responsible"

A person responsible has the right to know:

- what the proposed treatment is;
- what are the risks and alternatives;
- that they have the right to say "yes" or "no" to the treatment;
- that they can seek a second opinion.

The medical or dental practitioner has a responsibility to give the "person responsible" this information and seek his/her consent before providing the treatment.

What a "person responsible" cannot do

A "person responsible" cannot consent to:

- special medical treatment- for example, sterilisation or termination of a pregnancy;
- a treatment if the patient objects.

Lets turn to look at how someone else may manage your finances if you are incapable of doing this yourself.

Power of Attorney

A Power of Attorney is a legal document that you sign which gives someone else the right to do things in your name. Usually a Power of Attorney is made by a person (called the "principal") that allows another person (called the "attorney") to deal with the principal's money and assets. These assets may include the principal's bank accounts, money, shares, real estate and other types of assets. The Power of Attorney covers financial and property decisions, not life decisions - for which a Guardianship is required.

No one has the right to act for you unless you sign a Power of Attorney allowing them to act for you as your attorney.

There are two types of powers of attorney:

- A General Power of Attorney; and
- An Enduring Power of Attorney.

What does a Power of Attorney do?

The principal often gives the attorney the power to:

- Spend or otherwise manage the principal's money, including bank accounts;
- Buy or sell shares for the principal; and/or
- Buy, sell, lease or mortgage the principal's house or other real estate.

Essentially, depending on what limits you wish to impose, your attorney can do all the things you can do with your money and assets.

You should note that a Power of Attorney does not permit the attorney to make medical or personal decisions for the principal. If you want another person to make a medical or personal decision for you then you should appoint an "Enduring Guardian". The appointing of an Enduring Guardian requires the completion of a separate form called the "Enduring Guardian" form.

What is a General Power of Attorney?

A General Power of Attorney only lasts until the principal loses "mental capacity". This means that when the principal cannot manage his or her affairs or cannot understand a document that she or he is signing, the power given to the attorney will lapse.

A General Power of Attorney is useful when, for instance, you are going overseas for a short period and need someone to look after your affairs while you are away. Other examples for a General Power of Attorney include:

- If you become ill and need someone to take care of your finances while you are in hospital;
- If, for other reasons, you cannot get to your bank, real estate agent or other agencies and need someone to do it for you; or
- If you need someone to be able to sign documents on your behalf that deal with buying, selling or dealing with real estate.

What is an Enduring Power of Attorney?

An Enduring Power of Attorney is one that continues even after the principal has lost mental capacity. The formalities for an Enduring Power of Attorney differ from those for a General Power of Attorney.

You should talk to your lawyer about your particular circumstances when considering making a Power of Attorney.

An Enduring Power of Attorney is useful where you become unable to look after your affairs at some point in the future, perhaps because of physical or mental illness. An Enduring Power of Attorney allows you to prepare for that possibility.

An Enduring Power of Attorney lasts until:

- You die;
- You go bankrupt;
- You cancel the arrangement; or
- The government appoints a guardian for you.

Do I need to see a lawyer to make a Power of Attorney?

It is better to see a lawyer if you need someone to explain the powers to be given to your attorney, or if you have particular questions. Ask your lawyer about the cost of preparing a Power of Attorney. If you want to make an Enduring Power of Attorney, you will need to have it certified by a solicitor or other qualified person.

What are my attorney's obligations to me?

Your attorney must act in good faith. Most importantly an attorney must:

- Keep his or her money and assets separately from yours; and
- Keep proper records and accounts of how she or he handles your money and assets.

Your rights with an Enduring Power of Attorney

You will be able to manage your assets while you still can think properly and understand what is going on around you.

When should I make an Enduring Power of Attorney?

You should make an Enduring Power of Attorney when you are well and before you need someone to look after things for you. If you have lost mental capacity you cannot make an Enduring Power of Attorney because you will not be able to understand what you are

signing.

When does an Enduring Power of Attorney start?

An Enduring Power of Attorney starts as soon as you hand or post it to your attorney. You may specify that your attorney should not use the power until you say so, or only if you stop being able to think properly or to understand what is happening around you.

Who should I choose as my attorney?

Any person over eighteen years can act as your attorney. You need to choose someone you can trust and who is responsible – someone who will do what you would want. If you want to appoint more than one attorney you must indicate whether you wish them to act jointly (in which case they must all agree before acting for you), or jointly and severally (where one may act independently of the others).

What if I change my mind about my attorney?

You can revoke your Power of Attorney at any time, as long as you can still think properly and you understand what it means to revoke the power of attorney. You must give your attorney a letter or form revoking their appointment to ensure they know that their appointment is revoked.

This article is general in nature and is not intended as legal advice. If you have a question about any specific issue raised you should obtain your own legal advice. The Inner City Legal Centre provides free advice to intersex and trans identified people.

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