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WILLS & POWERS OF ATTORNEY

We hope that the following will assist you in understanding the topics of wills, estate administration and powers of attorney. This is not meant to be a complete or exhaustive text on all legal rights and obligations which may arise in connection with these topics. Please consult with a lawyer before making any will or signing any power of attorney.

WILLS

PURPOSE

A will is a document that ensures that a person's assets are distributed and managed as he or she wishes after death. It also allows for the person to provide for the support of family or other dependents. It also allows parents to select a guardian for young children.

The person making the will (the *Testator* if a male or *Testatrix* if a female) chooses the *estate trustees* (the person or persons who will administer the estate), and decides when property will be distributed and who will get what property. The person can decide that some or all property can be distributed immediately after death or can delay distributions, particularly for young children, to an appropriate time. Specific funds can be set up to provide for people who are unable to look after their own financial affairs.

A will can be as flexible as the person making it wants. He or she may treat different family members differently for any reason and particularly if they have different needs or abilities to handle money. Money may be held in trust for younger beneficiaries who may then get income at a certain age and capital in stages. There are certain rules against holding money too long and certain ways in which the will must be worded to prevent beneficiaries from collapsing any trust you establish before the time you intended.

A will may provide for specific gifts (*bequests*) of money or possessions to friends, relatives or charities. For example, collections can be passed on to persons who might be interested in the same items and family heirlooms, jewellery or keepsakes can be given to the appropriate persons.

ESTATE TRUSTEES

A person who administers an estate is an *Estate Trustee* (and was formerly referred to as an *executor* or *executrix*). More than one person may be appointed as an Estate Trustee and the Testator or Testatrix may, and should, appoint alternate Estate Trustees if the first choice predeceases or is unable to complete the administration of the estate. Usually, a person will appoint his or her spouse, although there is no legal requirement that this be so, and may then appoint one or two or more adult children, other relatives, friends or professionals as alternate Estate Trustees. In addition, a trust company may be appointed as Estate Trustee.

Estate Trustees must gather up assets, sell land, businesses or other assets which are not being given to any particular person, and liquidate investments; arrange for payment of debts, funeral expenses and income taxes; invest money until it is to be distributed; if permitted, exercise his or her discretion to give some or all of the money being held for a person to that person early in case of illness, accident or emergency or for purposes of education or according to criteria set out in the will (*encroachment*); and finally, distribute money or assets to beneficiaries at the time or times specified in the will.

An Estate Trustee should be a person who can handle financial matters, particularly if a will provides for holding and investing money or property for a period of time or operating or selling a business. An Estate Trustee need not have any legal knowledge as he or she may hire a lawyer to assist in the administration of the estate. A Testator or Testatrix should choose people who have good common sense and who have some sense of what the Testator or Testatrix might have wanted to be done in the various situations which may arise from time to time. A person has no obligation to accept an appointment as an Estate Trustee just because he or she is selected, so it is important to ask the person in advance.

If an estate is significantly large or otherwise complicated or if a lengthy period of administration is contemplated, including providing for young children or for disabled or infirm relatives who may need assistance for long periods of time, a person may wish to contemplate appointing a trust company as Estate Trustee. Advantages include long term stability, expertise, experience and impartiality. Disadvantages include expense, some inflexibility when requesting encroachments and a lack of familiarity with the testator's personality and wishes. It is possible to appoint two or more people or a person and a trust company. Day to day administration and record keeping and investment decisions can be delegated to the trust company while an individual may be appointed to dispose of personal items and collections and have a say in when encroachments may be paid. Where more than one person is appointed, all must act unanimously, unless the will provides otherwise.

VALIDITY OF WILLS

In the overwhelming majority of cases, the wishes set in a will are carried out without any difficulty. Sometimes, a will is challenged on the basis that the Testator or Testatrix lacked the necessary mental capacity to give instructions or that he or she was unduly influenced by a person benefiting, directly or indirectly, under the will. There may also be a challenge on the basis of misrepresentations or statements made to the Testator or Testatrix which caused him or her to insert provisions that would not have been inserted otherwise. Having the will drawn by a lawyer will ensure that there is a witness who can assure a court that the Testator or Testatrix understood his or her family relationships and responsibilities, the nature and extent of his or her property and that he or she was not improperly influenced in deciding what would happen to his or her property following death.

A will may also be challenged on the basis that it was improperly signed. In Ontario, a will must be signed or acknowledged by the Testator or Testatrix in the presence of two witnesses all present at the same time. A beneficiary or spouse of a beneficiary cannot be a witness. If they are, it will be necessary to prove to a court that there was no undue influence in connection with the making of the will. Witnesses must be of the age of majority.

A person can make a *holograph will*, which must be entirely in his or her own handwriting (not a mix of typed and handwritten words or a stationer's form filled in and signed) and which need not be witnessed. These are not recommended, except in emergency situations.

If a will is not properly signed or witnessed, it is completely invalid and no effect can be given to it, even though the Testator or Testatrix was of sound mind and even if the document appears to accurately reflect his or her wishes.

Although it does not invalidate a will, if a person fails to provide for his or her dependents (spouse, children or others who are financially dependent) they may sue the estate for support, just as they could have sued the Testator or Testatrix for support while alive. In addition, if a Testator or Testatrix fails to leave sufficient property to a husband or wife, such person may elect under the *Family Law Act* to take what the will provides for, or to take an equalization of family property, which is essentially one half of all assets accumulated during the marriage.

PREPARATION OF A WILL

Persons who are not trained in writing wills often make mistakes. These include writing a will which gives a particular item, such as an automobile or the contents of a specific bank account to a person. If the person making the will trades the vehicle or moves the bank account, the intended beneficiary gets nothing, as the gift is considered to have *adeemed*. Likewise, a *lapse* takes place in a situation where a person making a will makes a gift to a beneficiary who then predeceases the testator and there is nothing in the will which deals with what should happen to the gift in that event. There may be a *partial intestacy* where the gift is part of the residue of the estate. On the other hand, where there is a gift to certain close relatives (children or siblings), there is a legal presumption that if such a close relative dies, it is intended that his or her children or remoter issue are to get the gift. This may or may not reflect the wishes of the Testator or Testatrix. It is important to properly draft the will to clearly state what you want to have happen if any of your beneficiaries die before you or die in a common accident or in circumstances in which it is unclear who died first.

Certain other presumptions may apply. When a parent makes a provision by a will in favour of a child and then gives that child a substantially similar gift during his or her lifetime, there arises a presumption that the child was not to receive both gifts, and the gift in the will is *adeemed by advancement*. Where a testator is indebted at the time of the making of a will and leaves to a person a sum equal to or greater than the debt, that gift (or *legacy*) is presumed to be a satisfaction of the debt, and the person cannot have both repayment of the debt and the gift. It is important to state clearly in the will whether or not these presumptions are intended to operate or if the person making the will has an opposite intention.

Unless a contrary intention is expressed, a reference in a will to a group of relatives is deemed to include a person who is adopted and is also deemed to include a person who was born outside marriage. Therefore, if a person making a will does not want property left to a person deemed to be included as members of a family, the person must clearly state this in the will. The person making the will must also consider his or her own family situation and that of others who may have more children between the time the will is made and the person actually dies.

There are also special rules involved when providing for alternate methods of distributing assets including making outright gifts, providing for life interests, creating testamentary trusts, giving estate trustees powers to split income and determine what may be considered income or capital receipts and giving estate trustees authority to encroach on money being held for a person where that person may be in need of more than the income generated.

Most lawyers will also hold the will and powers of attorney for safekeeping. They will only release them as you instruct or if you become incapable of managing your own affairs.

INTESTACY

If a person dies without a valid will, he or she is said to have died *intestate*. In that case there is a scheme under the *Succession Law Reform Act* which essentially gives the first $200,000.00 of the value of the estate to the husband or wife (legal not common law). The balance is then split. If there is one child, the husband or wife will get one half of the balance and if there is more than one child, the husband or wife will get one third of the balance above the $200,000.00. The remainder will be divided equally between the children and if any have predeceased, grandchildren will take the share of their deceased parent.

If a person dies without a spouse, children or remoter issue, the estate is given to the person's parents if either or both are alive and if not, to brothers and sisters equally. The children of a deceased brother or sister will take their parent's share. If all brothers and sisters have predeceased, then nephews and nieces who survive the deceased, share equally. If there are no nephews and nieces then the estate is distributed to the closest living relatives (related by blood but not by marriage) and if there are no relatives the estate *escheats* to the provincial government.

If two persons die in an accident or in circumstances in which it is not possible to determine who died first, for purposes of distribution of property, each is considered to have survived the other. For jointly owned property, the property is divided into shares, one for each deceased owner.

In the foregoing schemes of distribution, all relatives of the same degree are treated equally. It does not matter what their actual relationship to the deceased was. In addition, a share of an estate payable to a person who has not attained the age of majority or who is otherwise disabled, is paid to government officials who administer it for the infant or disabled person. Getting early payment (*encroachment*) is difficult.

CHANGING A WILL

A person has the right to change his or her will at any time, as long as he or she continues to be mentally competent. A change is done by writing it on the original and signing in the same manner as the original (full signatures, not initials, and in the presence of witnesses), by writing a separate amending document known as a *codicil* or by making an entirely new will.

In certain circumstances, a will is deemed by law to be changed or revoked. These relate to marriage and divorce. On marriage, a will is deemed to be revoked, unless it states that it was made in contemplation of the marriage. Therefore a new will must be made when a Testator or Testatrix is married or about to be married. Also, when a Testator or Testatrix divorces, gifts to the former spouse are deemed to be revoked but the rest of the will remains valid. This may result in partial intestacy. **Note that separation does not bring about any automatic changes to a will. It is therefore necessary to make changes, before divorce, if desired**.

ESTATE ADMINISTRATION

GENERAL

Certain property passes to people by operation of law, such as property owned as *joint tenants* or held on *joint account with right of survivorship*, or such as insurance policies, RRSP's, RRIF's, TFSA's or other similar plans in which beneficiaries or successor account holders are named. With such property, it is simply necessary to provide proof of death, either by funeral director's certificate or, more properly, government issued death certificate to the financial institution or insurer. For land, an application containing the certificate is filed or a lawyer electronically certifies the fact of death. The person who is named as the beneficiary or the surviving joint owner is then entitled as a matter of law to ownership of the property.

Other property, such as small bank or investment accounts (usually under $25,000.00 or $30,000.00 depending on the financial institution) may also be transferred with proof of death and an affidavit which assures the bank that the person applying is entitled to the money or account and that there are no competing claims. The bank or investment dealer has the right to refuse a transfer without an Estate Trustee being appointed. In some cases a bond may be required. Other property, such as shares in family businesses, small businesses or partnerships, where all the parties know each other, can also be transferred as the parties determine.

If there is land that is held by the deceased not as a joint tenant or larger accounts, bonds or other holdings it will usually be necessary to apply to the Superior Court of Ontario for a *Certificate of Appointment of Estate Trustee(s)* (formerly called *probate*). The estate trustees named in the will must file an application, in the prescribed form, containing particulars of deceased's death and marital status, a valuation of the estate, the original will and affidavit regarding its signing, a copy of a notice advising that the application will be made, which must be sent to all beneficiaries and an affidavit proving service of same and certain other documents which may be required depending on the circumstances. An *Estate Administration Tax* (formerly called *probate fee*) of $5.00 per $1,000.00 (0.5%) of the value of the first $50,000.00 of the estate and $15.00 per $1,000.00 (1.5%) of the value in excess of $50,000.00 must be paid.

The Court will review the documents and presuming all is in order and that no one challenges the will, will issue the Certificate of Appointment of Estate Trustees. The Certificate will confirm the authority of the persons named as Estate Trustees and will give those persons authority to deal with the property of the deceased. This then enables them to gather assets and transfer properties.

DUTIES OF ESTATE TRUSTEES

An Estate Trustee must ascertain who the beneficiaries are and where they may be given notice of their interest in the estate, locate and value all of the assets of the Estate (including listing the contents of any safety deposit box) determine any debts and arrange for their payment, ascertain any tax liability for the deceased and the Estate, file the appropriate income tax returns and prepare accounts to the satisfaction of the beneficiaries or for the audit before the Court. Normally Estate Trustees will retain lawyers and accountants to prepare most of the documents or returns, although there is no requirement that they do so. Finally, Estate Trustees will be required to invest the assets of the estate and distribute them in accordance with the terms of the will.

Estate Trustees are also be responsible for taking possession of the deceased's residence and personal possessions and securing them. They will eventually dispose of the possessions as

required by the Will. If there are no specific instructions they will pass them on to those entitled under the will or sell them and divide the proceeds. They will also arrange for sale of any residence owned by the deceased, subject to what the will provides, or will terminate any lease of rented premises and will empty those premises.

Estate Trustees are not responsible for payment of debts if there are not sufficient assets in the estate but, may be personally liable to creditors and to the Canada Revenue Agency if they have distributed assets without properly checking that creditors and taxes have been paid. Unless they are sufficiently familiar with the business affairs of the deceased, it will be necessary to advertise for creditors in a local newspaper. Following same, Estate Trustees will not be liable to creditors of whom they were not aware and who have not given notice of their debts.

In rare cases where beneficiaries named in a will cannot be located the Estate Trustees must be able to establish that they have made reasonable efforts to locate them. The Estate Trustees, may bear a personal liability if funds are released without efforts made to locate beneficiaries or where applicable, their heirs should they ascertain who they are at a later date that funds were available and not paid to them.

In cases where there is not an immediate distribution of the estate and investment of all or part of the estate assets is required the Estate Trustees also have a duty to invest properly, as a "prudent investor". Estate Trustees may retain and rely upon the advice of financial agents so long as the Estate Trustees properly monitor the activities of the financial agents. These obligations are outlined in the *Trustee Act* and are summarized as follows:

- A trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

- A trustee may invest trust property in any form of property in which a prudent investor might invest.

- A trustee may invest in mutual funds, pooled funds or segregated funds under variable insurance contracts.

- If trust property is held by co-trustees and one of the co-trustees is a trust corporation the trustees may invest in a common trust fund, that is maintained by the trust corporation.

- A trustee must consider the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances:

    - General economic conditions.
    - The possible effect of inflation or deflation.
    - The expected tax consequences of investment decisions or strategies.
    - The role that each investment or course of action plays within the overall trust portfolio.
    - The expected total return from income and the appreciation of capital.
    - Needs for liquidity, regularity of income and preservation or appreciation of capital.
    - An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

- A trustee must diversify the investment of trust property to an extent that is appropriate to the requirements of the trust and general economic and investment market conditions.

- A trustee may obtain advice in relation to the investment of trust property and may rely upon such advice if a prudent investor would rely on the advice under comparable circumstances.

- A trustee must act in accordance with the terms of the trust.

- A trustee may authorize an agent to exercise any of the trustee's functions relating to investment of trust property to the same extent that a prudent investor, acting in accordance with ordinary investment practice, would authorize an agent to exercise any investment function **but** the trustee must have prepared a written plan or strategy that, comprises reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances, is intended to ensure that the functions will be exercised in the best interests of the beneficiaries of the trust.

- A trustee may not authorize an agent to exercise functions on the trustee's behalf unless a written agreement between the trustee and the agent is in effect and includes, a requirement that the agent comply with the plan or strategy in place from time to time; and, a requirement that the agent report to the trustee at regular stated intervals.

- A trustee is required to exercise prudence in selecting an agent, in establishing the terms of the agent's authority and in monitoring the agent's performance to ensure compliance with those terms.

- prudence in monitoring an agent's performance includes,
  - reviewing the agent's reports,
  - regularly reviewing the agreement between the trustee and the agent and how it is being put into effect, including considering whether the plan or strategy of investment should be revised or replaced, replacing the plan or strategy if the trustee considers it appropriate to do so, and assessing whether the plan or strategy is being complied with,
  - considering whether directions should be provided to the agent or whether the agent's appointment should be revoked, and
  - providing directions to the agent or revoking the appointment if the trustee considers it appropriate to do so.

TAXATION ON DEATH

Estate Trustees must file final income tax returns and arrange for payment of any tax owing from the assets of the estate. In addition to a final return for regular income (eg. income from employment, business or investments), estate trustees must determine if further special returns should be filed for additional items that arise as a result of death. Although there are no "death taxes" in Canada, death does have certain tax consequences.

The first is that all capital property (investments such as stocks, bonds or real estate, business property etc.) is deemed to be disposed of on the date of death and to be reacquired by the estate. This triggers capital gains tax on the increase in value of the property. The deceased's principal residence is exempt, just as it was while the deceased was alive.

Another tax consequence is that income earned but not yet collected (examples include vacation pay, dividends declared but not yet paid) must be reported and tax paid. The Estate Trustees can include such income on the final return or file a separate "rights or things" return. Likewise Estate Trustees must file returns for income from testamentary trusts where the trust's fiscal year ends before the calendar year and before the date of death and a return for business dealings if the deceased was a partner in a business or profession or a sole proprietor. Separate returns can be filed for each of these categories of income which results in claiming personal credits against the income on each return and the lower rate of tax on some of the income. Also, certain unique rules allow certain medical expenses and charitable donations that would not otherwise be deductible in a given year to be deducted in the year of death.

Finally, all RRSP's or RRIF's must be collapsed and the income included in the year of death, unless they are transferred to a spouse or financially dependent child or grandchild who was named as a beneficiary in the Plan.

Eventually, the Estate Trustees should obtain a clearance certificate from Canada Revenue Agency. This effectively discharges the Estate Trustees from tax obligations. A certificate is not given automatically but must be requested. It will not be issued until all returns have been filed and assessed and all tax paid.

ESTATE ADMINISTRATION TAX ENFORCEMENT

As noted above, when a Certificate of Appointment of Estate Trustee(s) is applied for, an *Estate Administration Tax* (formerly called *probate fee*) of $5.00 per $1,000.00 (0.5%) of the value of the first $50,000.00 of the estate and $15.00 per $1,000.00 (1.5%) of the value in excess of $50,000.00 must be paid. New enforcement proceedings have been put into effect as of January 1, 2015, which are designed to increase the amount of tax recovered by the Government of Ontario. The Government's position now is that, the transfer of any property (land, bank accounts, investments or other assets) to joint tenants, if made for the purpose of having the individuals hold as trustees (meaning that the transfer is not made as a gift), is taxable, even though probate may not required for disposition of the property. Therefore, the Government requires that the value of the property be included in the Estate Administration Tax Return, which will be filed on behalf of the Estate.

There are, however, two exceptions to this requirement, as follows:

a. Where no Certificate of Appointment (probate) is required because there are no assets that require it. That means that **everything** (real property, bank accounts, investment accounts and otherwise) would be on joint tenancy (for bank and investment accounts "as joint tenants with right of survivorship"), or in the case of insurance policies, RRSPs, RRIFs and TFSAs, beneficiaries are named that so that the contents of the account or policy automatically passes to them. If no probate need be applied for, then no Estate Administration Tax need be paid.

b. Where there are assets which may require probate, it is possible to reduce the Estate Administration Tax payable by making double wills as noted above. A Primary Will, deals with assets that require probate, such as land or accounts that are owned by the deceased alone, without any Joint Tenants. Estate Administration Tax will be payable on the assets dealt with under that will. A Secondary Will, deals with assets that do not normally require probate. This would include shares of private corporations and property or accounts held on joint tenancy or joint account for which the surviving joint tenant has agreed will be distributed to various Estate beneficiaries. No Estate Administration Tax

is payable on the assets dealt with under that will.

HOW A LAWYER WILL ASSIST ESTATE TRUSTEES

Lawyers prepare the materials the Court requires to grant the Certificate of Appointment, and serve the beneficiaries of the estate with the required notice, assist estate trustees in the realization and transfer of assets and in the preparation of accounts. This will usually include communicating with the various holders of assets of the estate including banks, investment advisors, insurance companies and otherwise. Making decisions in regard to discretionary matters, such as investment of assets or encroachment on capital where the Will permits it, rests with the estate trustees. The will may provide certain guidelines or specific direction. In addition, investments must be made in the manner prescribed in *The Trustee Act* (as described above) unless the Will provides otherwise.

In some cases estate trustees prefer to do as much of the work involved in administration as they can. For example, they attend at banks and with other asset holders to obtain particulars of the assets and they prepare an inventory of the estate. In other cases, estate trustees prefer that lawyers perform these services on their behalf.

ESTATE TRUSTEE COMPENSATION

In Ontario an Estate Trustee is entitled, but not obliged, to receive compensation for his or her time and trouble expended in connection with the administration of the Estate. If an estate trustee chooses to take compensation the amount allowed is at the discretion of the Court or it can be agreed upon by you and all of the beneficiaries. Experience indicates that the amount currently awarded is approximately 2.5 % of income and capital received and 2.5% of income and capital distributed and a percentage of the value of assets not being immediately distributed but being managed over a period of time.

If the beneficiaries are all adult and agree with the accounting for estate assets realized and disposed of, it is possible to have them approve the accounts or negotiate the amount of compensation claimed and avoid any Court involvement. If children or other people who are under legal disability or charities are entitled to a share of the residue of the estate, as opposed to a specific bequest or gift, it will be necessary to have the accounts reviewed and approved by the Court and subject to comment of the Children's Lawyer or the Public Guardian and Trustee, both government officials who oversee matters involving children, persons under legal disability or charities. An Estate Trustee may also choose to waive compensation, particularly if he or she is a beneficiary. Compensation paid to an estate trustee is taxable income whereas money paid to a beneficiary is not. No HST is payable to or by persons who receive such compensation, if they are not professionals in dealing with estates.

Where there are a number of executors the compensation must be divided in accordance with the work performed by each. The foregoing guidelines are applied having regard for the complexity of the Estate and the time expended. An estate trustee may not be entitled to as high a fee on an estate which consists of a single investment account but may be entitled to a higher fee where there are a large number of assets to be evaluated and liquidated or complicated business dealings which must be attended to.

PASSING OF ACCOUNTS

It is necessary to satisfy the persons entitled to the *residue* of the estate, (those who have not been left specific sums or objects but who are entitled to a share of whatever remains) that estate funds have been gathered and distributed in accordance with the will. Where there are

adult beneficiaries this can usually be done informally without any involvement of the Court. If however any beneficiary questions the accounting or where there are children, persons under disability or charities involved, it will be necessary to have the Court approve the accounts. Usually, a lawyer is retained to prepare the necessary documents including the appropriate statements of original assets, income and capital receipts and disbursements and otherwise. A passing of accounts, although required, can be done on an unopposed basis so that it will not be necessary for any attendance in Court and therefore, costs can be minimized. If any beneficiary has questions as to how money was invested or spent or if there is some question as to whether or not all original assets have been accounted for, these are resolved on the passing of accounts.

POWER OF ATTORNEY - MANAGEMENT OF PROPERTY

PURPOSE

If a person becomes incapable of managing his or her financial affairs or making personal decisions, suddenly because of an accident or stroke or gradually, because of a debilitating illness such as Alzheimer's Disease, someone has to be able to make decisions for them. Some people also might wish to have someone be able to act for them if they travel for extended periods of time or are otherwise unable to attend to financial or business affairs.

GOVERNMENT INVOLVEMENT

Under the *Substitute Decisions Act, 1992*, if a person becomes incapable of managing his or her personal affairs, the Ontario government's *Public Guardian and Trustee* initially manages that person's property for unless other provisions are made. The Public Guardian and Trustee automatically becomes guardian of the estate of a person who is certified by a hospital to be incapable of managing his or her property.

Certain individuals such as a spouse or children will have the right to apply to the Public Guardian and Trustee to take over as the statutory guardian of property. They will be supervised by the Public Guardian and Trustee and will be required to prepare and file a management plan and post security. Also, if assets are sold, rather than being able to distribute same to family for their needs, funds must be held for the person whose assets are being managed, even if there is little or no likelihood that same will be needed.

All of this may be avoided if a valid Continuing Power of Attorney is in existence. The person appointed as attorney automatically replaces the Public Guardian and Trustee simply by filing a copy of the Power of Attorney.

WHAT A POWER OF ATTORNEY DOES

Under a *Continuing Power of Attorney* a person (the *donor)* may appoint one or more *attorneys* to have the authority to do anything that the donor could do including collecting income, conducting banking, paying bills, making contracts, selling or mortgaging real estate and looking after financial needs of the donor and his or her dependents.

The *attorney* (meaning the person who is appointed to sign, not a lawyer) has the right to take immediate action and takes precedence over the Public Guardian and Trustee. An attorney does not have to provide security nor is he or she required to file any management plan. Only the courts, and only for good cause, can interfere with an attorney's administration of property.

Attorneys have the right to obtain all of the donor's records, including banking, financial and tax records and to review the donor's will.

CONTROL OF THE ATTORNEYS

The donor has the right to set whatever limits, conditions or restrictions he or she wants in the Continuing Power of Attorney. For example, a donor can forbid an attorney from taking certain actions such as from selling certain property or selling it for less than a minimum price.

As with a will, a donor can appoint more than one attorney and can require that all persons chosen must agree on any action to be taken and that each one must sign cheques and other documentation. In the alternative, the donor can specify that a majority may make decisions and sign documents.

A donor can prevent the power of attorney from being used unless a doctor certifies that he or she cannot manage his or her affairs. In the alternative a donor may provide that the power of attorney can be used at any time without reference to mental state.

By law, an attorney may not sell property that is subject of a specific testamentary gift in your will. That means that if a donor chooses to leave specific property to a named person in a will, the attorney must preserve that property unless it is necessary to dispose of it for the donor's needs.

As is the case under a will, attorneys have a duty to maintain accounts of their activities including a list of assets received by the attorneys and disposed of by them, a list of all money received and spent and a list of all investments made, liabilities incurred and satisfied and compensation claimed by the attorneys. Immediate family members have a right to review the records as does the Public Guardian and Trustee and if mismanagement is suspected, resort to the Courts may be had.

CHANGES

A donor is entitled to revoke a Power of Attorney at any time, as long as he or she is mentally competent. A donor may sign a new Power of Attorney at any time, change attorneys or set out different instructions or restrictions.

POWER OF ATTORNEY - PERSONAL CARE

A Continuing Power of Attorney is for property only. A person is also entitled to make a *Power of Attorney for Personal Care.* This will permit the attorney or attorneys (who can be a different person or persons from those who deal with the donor's property) to make decisions regarding health care if the donor is not able to do so. This will include decisions as to medical treatment which may be administered or withheld, decisions as to whether or not the donor may be admitted to a hospital, nursing home or other health care facility and general decisions about personal care, including medical treatment, hygiene and nutrition. This applies **only** where the donor is not capable of making his or her own decision.

A donor may include instructions to or restrictions on an attorney. A donor may instruct an attorney to refuse consent to certain types of medical treatment and might, as in a "living will", specify that certain treatments are not to be taken in the event of terminal illness and further might authorize or direct an attorney to execute a "Do Not Resuscitate Order" at a hospital. Such instructions can include restrictions complying with the donor's religious or moral beliefs, such as a refusal to permit blood transfusions. A donor might also require that he or she is to be cared for at home as opposed to in an institution wherever possible.

MAKING A POWER OF ATTORNEY

To be valid, a Power of Attorney must be in writing and be signed in the presence of two witnesses. There are certain restrictions as to who is allowed to be a witness and certain requirements that the witnesses be able to attest to. Neither the attorney nor his or her spouse or live-in partner may witness nor can the spouse or child of the donor.

It is also important that at the time a person signs the Power of Attorney he or she has understanding as to what the Power of Attorney does, what his or her property is and certain other prescribed matters and that the witnesses to the document be able to attest to such understanding.

The requirements are somewhat technical and it is important that persons wanting a power of attorney consult with a lawyer to make sure that signing is done in the proper manner and that evidence of capacity is properly documented.

WILLS AND POWERS OF ATTORNEY

A will operates only from the time a person dies and has no effect while you the person is alive. A Power of Attorney operates while a person is alive and ends on death. A will and a Power of Attorney are therefore very different but complementary documents. A person should have both.