
Powers of Attorney & Health Care Directives



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What is a power of attorney?

A power of attorney is a simple way of granting to some other person the rights to deal with your property when you are not able. A power of attorney is generally effective from the time it is signed and ceases in almost all cases on your death. The power of attorney allows someone you have chosen to look after your affairs in the event you are unable to do so. The person named in the document is called the "attorney" – but the person does not have to be a lawyer.

WHY DO I NEED A POWER OF ATTORNEY?

Not being able to do look after your affairs because of an extended holiday or physical impairment are common reasons for granting a power of attorney, however, a more important reason is where you have lost mental capacity to do so. A

power of attorney that has a clause that allows it to continue notwithstanding the mental incapacity of a person is called an "enduring" power of attorney.

A "general" power of attorney should authorize the named attorney to deal with all matters as set out in the document. A "limited" power of attorney deals only with the specific matters set out in the document. A power of attorney takes effect from the moment it is signed unless it is a "springing" power of attorney which takes effect upon the occurrence of a specific event (for example, in the event you are mentally incompetent.) However, you do not automatically hand over or lose your own authority as soon as the document is signed. You continue to manage your affairs until you either decide you want your attorney to help you or you are no longer mentally competent and are unable to manage your affairs.

WHAT IF I DON'T HAVE A POWER OF ATTORNEY?

Without an enduring power of attorney, the only way anyone can take charge of your affairs is with the authority of the court through a committee order. This process is time consuming, expensive and emotional. It can take several months to obtain the necessary doctor's reports (two are required) as well as the necessary consents for the nomination of the person who will become the committee. An enduring power of attorney spares everyone from the lengthy court process.

Those who have a concern about granting this power can create a "springing" power of attorney or can arrange with a lawyer for the power of attorney document to be held until it is absolutely necessary. An enduring springing power of attorney only comes into effect in the event of a specific event (for example, in the event of mental incompetence). However, a springing power of attorney might not meet all your needs. For example, if you are in hospital for an extended period of time because of health issues, a springing power of attorney will not come into effect because you are not mentally incompetent. A new power of attorney would have to be prepared.

HOW DO I CHOOSE AN ATTORNEY?

Your attorney should be someone whom you trust and who will be able to manage your affairs in a fair and business-like fashion. It can be, but does not have to be, the same person who is named as the executor in your will. The attorney must be an adult, must be mentally competent and cannot be an undischarged bankrupt. Most often, couples will name each other as the attorney. If you are no longer living in your home (perhaps you are in an assisted living facility) and your spouse wants to sell the home, he or she cannot sign the sale documents on your behalf. An alternate attorney must be appointed to sign any such documents. It is a wise

precaution to name an alternate attorney in any event so that, if something happens to the first name attorney, someone else already has been named to look after your affairs. You can name more than one attorney but ensure that you specify whether they are to act jointly or if one is named as an alternate to act only if the first-named can not act.

IF I AM INCOMPETENT WHO MAKES SURE MY ATTORNEY IS ACTING IN MY BEST INTEREST?

In your power of attorney, you can name the person who is entitled to receive an accounting of your affairs if you are mentally incompetent. Depending on the wording of the document, the recipient is able to demand an accounting from the attorney on a regular basis. In the accounting, the attorney sets out the money that has come in, the expenses that have been paid and the status of your assets and debts. If you do not name the recipient of the accounting in your power of attorney, the attorney must report to your nearest relative on an annual basis. The attorney and his or her spouse do not qualify as nearest relatives.

HOW DO I PREPARE A POWER OF ATTORNEY?

There is no standard form of power of attorney. We recommend that you talk with your lawyer about how to prepare the power of attorney, the effect of the document, what powers should be in it and who should act as your attorney. If you want an enduring power of attorney that will survive mental incompetence, it has to be witnessed by certain professionals. The list in The Powers of Attorney Act includes a lawyer entitled to practice in Manitoba and notary public in Manitoba.

WHAT IS A HEALTH CARE DIRECTIVE?

A health care directive is also sometimes referred to as a "living will." The main purpose of a health care directive is to

name another person to make medical treatment decisions on your behalf (called a proxy) when you are incapable of making those decisions yourself. In addition, the health care directive may contain your wishes for medical treatment or you can leave it up to the proxy to act in accordance with your wishes that are known to the proxy or to act in accordance with your best interests.

WHY DO I NEED A HEALTH CARE DIRECTIVE?

If you are unable to communicate your wishes, the health care directive determines who can consent to treatment or withdrawal of treatment on your behalf. In addition, you have the option of setting out your wishes on the type of medical treatment that you want or do not want to be administered to you. "Medical treatment" is defined as "anything that is done for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purpose and includes a course of treatment."

WHEN DOES A HEALTH CARE DIRECTIVE TAKE EFFECT?

The health care directive will take effect when you have lost the capacity to make and communicate health care decisions for yourself and will remain effective for the duration of your incapacity. You will resume making decisions once you regain the ability to do so. However, the onus is on you to make people aware of the health care directive. A treating physician or medical personnel are not required to find out if there is a health care directive. They are not liable for acting contrary to your wishes in the health care directive if they did not know it existed or what was in it. You should have a copy of your health care directive with you in case of emergency and provide a copy of the health care directive to your proxy.



WHY SHOULD I APPOINT A HEALTH CARE PROXY?

The appointment of a proxy allows that person to essentially step into your shoes to make a decision if you are unable to do so. It is very important that you communicate any specific health care wishes with the proxy so that he or she knows what to do or what your wishes are if the situation arises.

For example, the proxy can consent or refuse life-prolonging treatment, palliative care, nutrition or hydration. A proxy can also make decisions about organ donation.

Appointing the proxy (and an alternate proxy in the event the first named person is unable or unwilling to act) avoids the heart-breaking process of trying to make a decision by committee in the waiting room of the hospital. You have chosen the person who has the authority to make medical decisions if you are unable to do so.

A proxy does not have the authority to request or consent to medically assisted death on your behalf.

WHO SHOULD I NAME AS A PROXY?

Your proxy should be someone that you trust to make the difficult decisions that may be necessary in the event of a health crisis. Often, it may be your spouse, sibling or child.

The Health Care Directives Act requires that the proxy be at least 18 years of age and apparently mentally competent.

You can name more than one proxy but ensure that you specify whether they are to act jointly or if one is named as an alternate to act only if the first-named can not act.

HOW DO I PREPARE A HEALTH CARE DIRECTIVE?

Like the power of attorney, there is no required or standard form. The Health Care Directives Act says the health care directive must be written, dated and signed by you. A witness is not needed. Your lawyer will have a form of health care directive available for you to consider. It may be a simple health care directive which often is one page. It may be an advanced health care directive which sets out specific treatment options for you to choose. It will be useful for you to speak with a health care professional about the meaning of various treatment options.

YOU CAN FIND FURTHER INFORMATION AT:

<https://www.gov.mb.ca/health/livingwill.html>

<http://www.wrha.mb.ca/acp/files/Workbook.pdf>