



# Dealing with Incapacity and Death, From a Legal Perspective

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# Disclaimer

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# Presumption of Capacity

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## **Presumption of capacity**

**2** (1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract. 1992, c. 30, s. 2 (1).

## **Same**

(2) A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.

# Incapacity – Manage Property

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## **Incapacity to manage property**

**6** A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

# Incapacity – Personal Care

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## **Incapacity for personal care**

**45** A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

# What is a Power of Attorney

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A power of attorney is an authority given to another person to act on behalf of the grantor, in conducting the grantor's financial affairs or in making personal care decisions

There are two types of powers of attorney:

Power of Attorney for Property

Power of Attorney for Personal Care

Grantor = person giving power of attorney

Attorney = person being granted authority to act

# Capacity to Give POA for Property

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## **Capacity to give continuing power of attorney**

**8 (1)** A person is capable of giving a continuing power of attorney if he or she,

(a) knows what kind of property he or she has and its approximate value;

(b) is aware of obligations owed to his or her dependants;

(c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

(d) knows that the attorney must account for his or her dealings with the person's property;

(e) knows that he or she may, if capable, revoke the continuing power of attorney;

(f) appreciates that unless the attorney manages the property prudently its value may decline; and

(g) appreciates the possibility that the attorney could misuse the authority given to him or her. 1992, c. 30, s. 8 (1).

## **Capacity to revoke**

(2) A person is capable of revoking a continuing power of attorney if he or she is capable of giving one. 1992, c. 30, s. 8 (2).

## **Validity despite incapacity**

**9 (1)** A continuing power of attorney is valid if the grantor, at the time of executing it, is capable of giving it, even if he or she is incapable of managing property.

# Capacity to Give POA for Personal Care

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## **Capacity to give power of attorney for personal care**

**47 (1)** A person is capable of giving a power of attorney for personal care if the person,

(a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

(b) appreciates that the person may need to have the proposed attorney make decisions for the person. 1992, c. 30, s. 47 (1).

## **Validity**

(2) A power of attorney for personal care is valid if, at the time it was executed, the grantor was capable of giving it even if the grantor is incapable of personal care. 1992, c. 30, s. 47 (2).

## **Capacity to revoke**

(3) A person is capable of revoking a power of attorney for personal care if he or she is capable of giving one.

# Taking Precautions

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When is my power of attorney effective?

- Personal Care – when incapable
- Property – depends
- Risks of misuse

Option - store with the lawyer, provide a Direction re release of the power of attorney

# Considerations as the Attorney

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- You are a “fiduciary”
- Get independent legal advice before acting
- Working “JOINTLY”
- Obligation to account (property) – keep proper vouchers
- Transparency
- Consulting with supportive family
- Proper use of funds/spending properly vs withholding funds/misuse

# Power of Attorney for Personal Care

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## Instructions in POA

- Evidence of your wishes
- Can always be superseded by later wishes (oral or written)

## Medical Assistance in Dying (MAID)

- You cannot give advance consent to MAID
- Your attorney cannot consent to MAID on your behalf

What if there is no  
Power of Attorney?

# Personal Care – Treatment Decisions

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If I don't have a Power of Attorney for personal care, who makes treatment decisions?

1. Guardian
2. Attorney
3. Representative for a proposed treatment, appointed by CCB
4. Spouse/partner
5. child/parent/Children's Aid Society
6. Parent, who only has right of access
7. Brother/Sister
8. Any other relative

# Court Appointment – Property & Personal Care

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## *Substitute Decisions Act*

### **Court appointment of guardian of property**

**22** (1) The court may, on any person's application, appoint a guardian of property for a person who is incapable of managing property if, as a result, it is necessary for decisions to be made on his or her behalf by a person who is authorized to do so.

### **Court appointment of guardian of the person**

**55** (1) The court may, on any person's application, appoint a guardian of the person for a person who is incapable of personal care and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.

Personal care: health care, nutrition, shelter,  
clothing, hygiene or safety

Attorney for  
Property/Personal Care

vs

Estate Trustee (Executor and  
Trustee)

# Why Do I Need a Will?

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1. Wills allow individuals to provide for their loved ones in the manner that they choose
  - A. Control of assets for minors – delaying distribution
  - B. Safeguarding assets for beneficiaries receiving ODSP
  - C. Blended families
2. Wills can be used to minimize income tax and provincial tax, formally known as Estate Administration Tax and commonly referred to as “probate fees”
3. Wills allow you to appoint the person or people that you trust most to manage your estate

# Elements of a Will

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- Appointment of Executor/Trustee
  - Waiver of bond
- Funeral/burial wishes
- Appointment of Custodian for minors (if necessary)
- Gifts of money/property/personal belongings
  - Charitable gifts
- Trusts
- Powers of Executors and Trustees

# Valid Wills

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Age

Knowledge and approval

Capacity

Formalities

- Proper witnesses, etc.

# Adoption

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Legally adopted child – Adoption Order

- not distinguished from a biological child
- ceases to be a child of the biological parents
- unless will provides otherwise

# Types of Wills

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Lawyer-prepared wills

Will kits

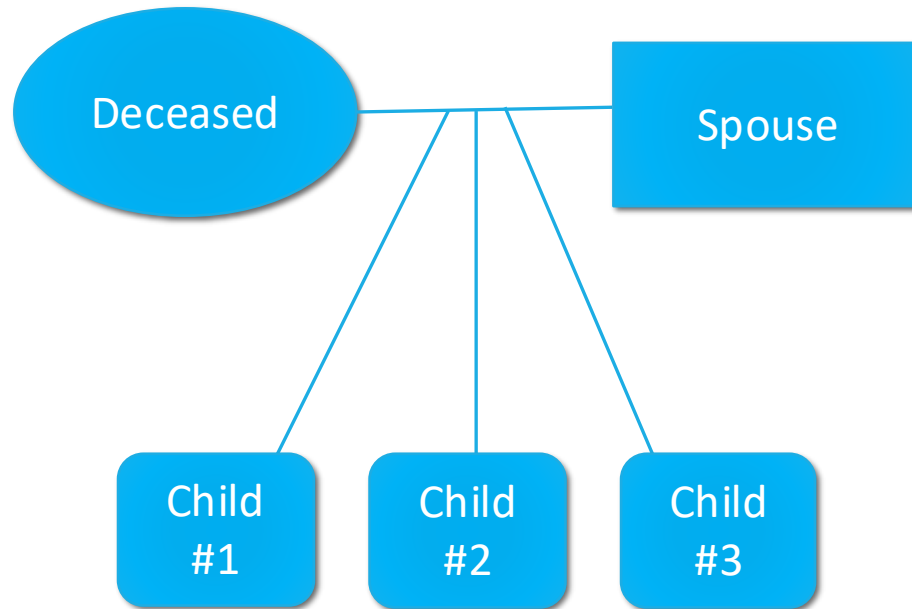
Holograph wills – own handwriting (not typed), without formality, without witnesses

# What Happens If I Don't Have a Will?

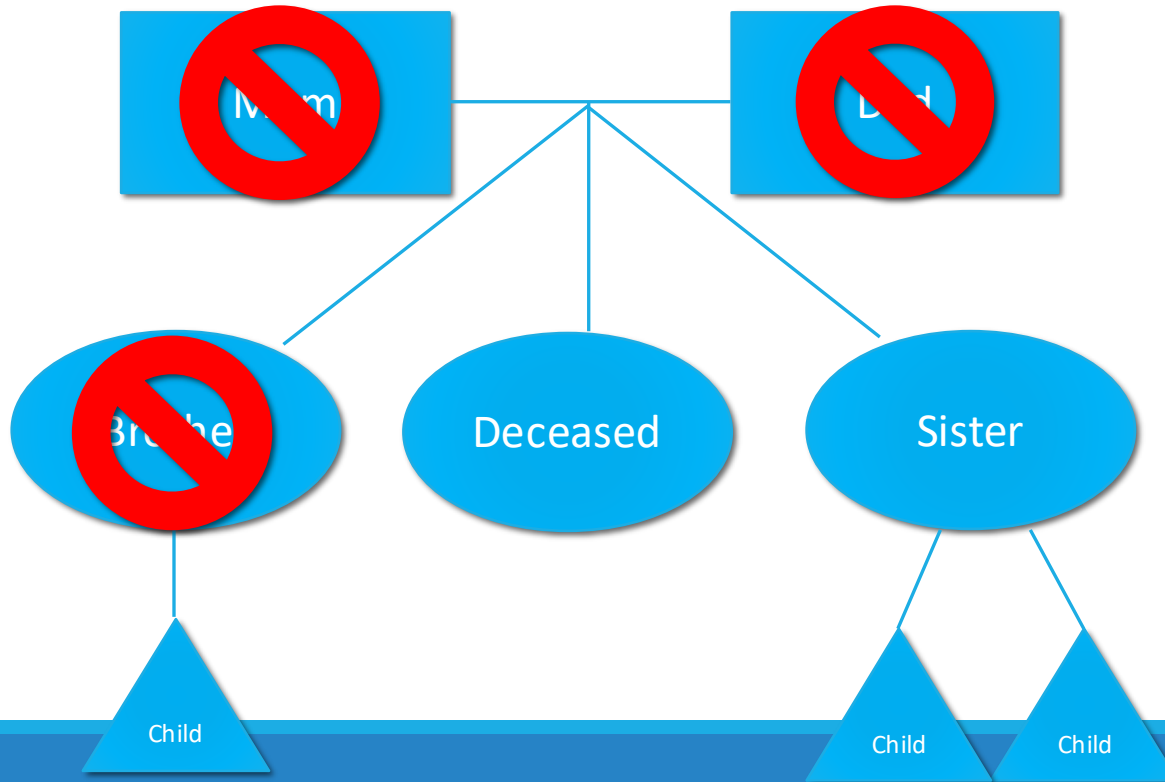
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If you die without a will, the *Succession Law Reform Act* (the “SLRA”) governs the distribution of your assets.

# Intestacy: Spouse and/or Issue



# Intestacy: No Spouse or Issue



# What Happens If I Don't Have a Will? (continued)

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If you do not have a spouse, issue, surviving parents, siblings, nieces or nephews, your estate is divided among your next of kin

Only in the event that you have no surviving next of kin will your estate go to the Crown (i.e. the government)

# Important Reminders About Wills

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Revocation –

destruction; making a new will; declaration; marriage

How to make changes to your will –

holograph changes - risks

Your will applies to all of your assets held by you at your death unless it specifies otherwise or you have disposed of those assets through other means (i.e. designations, joint ownership, etc.)

If you have a will, always review it as life changes (marital status, additions to family, change in assets, etc.)

# Early steps following death

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- Power of Attorney – no longer effective.
- Funeral arrangements - who is responsible?
- Reading of the Will (...not usually)
- Expected Information – the will, executor/s, beneficiary/ies

# Executor's Initial Considerations

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- Fiduciary
- Joint or Individual Appointment
- Ascertain & pay debts
  - Immediate/known debts (credit card)
  - Advertising for creditors
- Cancel ID/Cards/Notify Financial Institutions

# Probate

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- Application for Certificate of Appointment of Estate Trustee With (or Without) a Will
- Joint or Individual Appointment
- Ascertain & pay debts
  - Immediate/known debts (credit card)
  - Advertising for creditors
- Cancel ID/Cards/Notify Financial Institutions

# As time passes...

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- The "Executor's Year" – everything takes time
- Without a Will ("Intestacy") –
  - Things take longer (usually)
- Selling Real Property
- Tax Filings (Terminal Return, Trust Return/s)
- Estate Information Return
- Dealing with personal property
- Accounting, Releases, and Distributions

# Beneficiaries

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- Expect to be updated / request updates'
- Expect to receive accounting
- Expect reasonable communication

# Complicating Factors

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- Claims – contractual, outstanding debts (disputed)
- Dependents' relief claims
- Equalization of net family property (matrimonial)
- Will challenges
  - Capacity
  - Undue influence

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# QUESTIONS?

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