THE LAWYER'S DAILY

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Incapacity

Powers of attorney and advanced care planning: Disability

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(July 24, 2019, 8:31 AM EDT) -- An estimated one in five Canadians (or 6.2 million) aged 15 years and over had one or more disabilities that limited them in their daily activities, according to new findings from the *2017 Canadian Survey on Disability*. Statistics Canada reports that one in three Canadians will experience some form of disability lasting more than 90 days during their lifetime. While there are no helpful statistics on what proportion of persons with disabilities require an alternate decision maker to assist with property management or personal care/medical decisions, it is safe to say a significant percentage do or will.

These statistics coupled with our aging population illustrate the serious need for everyone to have properly planned for incapacity. This series of articles discusses legal issues involving powers of attorney and practical considerations in planning for incapacity using powers of attorney.

This first article in our series reviews the legislative framework in Ontario for powers or attorney and the two most common types of powers of attorney in Ontario. It also discusses what happens if you don't make powers of attorney prior to becoming incapable.

When discussing incapacity planning, it is important to distinguish between a will and a power of attorney. A will deals with disposition of a person's assets after death and takes effect only on death. In contrast, a power of attorney is used during one's lifetime and terminates on death.

Two types of powers of attorney are commonly used in Ontario for incapacity planning: a continuing power of attorney for property and a power of attorney for personal care. Both types are governed by the Ontario *Substitute Decisions Act, 1992* (SDA).

The SDA protects the rights, interests and well-being of individuals who become incapable of making decisions about their property or personal care. It allows a person some control in making decisions regarding his or her property and in deciding aspects of his or her personal care when the person is no longer capable of making such decisions. The SDA also helps protect incapable people from financial or other abuse by creating safeguards and sets out the rights and obligations of an incapable person's attorney. "Attorney" in this regard means a substitute decision maker.

What's a continuing power of attorney for property? What does incapable of managing property mean? Under a continuing power of attorney for property, you can give to others the legal authority to make decisions about the management of your property (that is, your assets and financial affairs) which will continue should you become incapable.

Your attorney for property has the power to do anything on your behalf with respect to your property that you could do if capable, except make a will. The granting of a continuing power of attorney for property does not limit your power to act on your behalf. Instead, it authorizes an attorney to share

that power with you, and to act on your behalf.

The SDA defines a person to be incapable of managing property if he or she 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.

What is a power of attorney for personal care? What does incapable of personal care mean? The SDA also allows you to appoint an attorney to make personal care decisions for you in the event you are no longer mentally capable of making such decisions for yourself. While you can have your attorney for property assist you with managing your assets while you are capable of doing so, personal care and medical decisions cannot be made for you if you are capable of making them yourself.

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

What if you don't make powers of attorney? Under the SDA, if a person does not have a power of attorney for property which is effective after he or she becomes incapable, it will likely become necessary for family members or other interested persons to apply to court to have a "guardian for property" appointed to manage their financial affairs.

Unfortunately, the procedure for appointing a guardian for property is lengthy, expensive and does not allow you to choose who will manage your property or how it will be managed should you become incapable. It also involves court or government supervision of the management of your affairs, which adds additional expense and complexity for the person(s) appointed to manage your affairs.

If a person does not have a power of attorney for personal care, it may be necessary for a family member to apply to court to have a "guardian for personal care" appointed to make decisions in regard to the incapable person's health care, nutrition, shelter, clothing, hygiene and safety, although certain decisions, especially in an emergency, can be made by certain family members for you. Just as with the appointment of a guardian for property, the procedure for appointing a guardian for personal care takes time, is expensive and does not allow you to choose who will make personal care decisions for you.

Our next article in this series will consider important issues involving continuing powers of attorney for property.

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