

THE
**FAMILY
FIGHT**

Planning to avoid it



By Wills & Estates Lawyers
Barry Fish & Les Kotzer

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FOREWORD

The focus of this book is estate planning with a view to avoiding family fighting. By way of an introduction, let us briefly highlight some of the issues which we will be discussing. We will begin with an introduction to two of the most important documents you will ever sign during your life. These documents consist firstly of the Continuing Power of Attorney for Property, sometimes referred to as the Enduring Power of Attorney for Property, which will enable you to appoint someone you trust to look after your financial affairs in the event that you become incapable of making financial decisions for yourself. For the purpose of abbreviation for the rest of this book, that document will be referred to as "the Continuing Power of Attorney for Property". The second of these documents is referred to as the Power of Attorney for Personal Care, which enables you to appoint someone you trust to make personal and health care decisions for you in the event that, by reason of your incapacity, you become unable to do so for yourself. We will be discussing issues to think about regarding these documents and specifically, what to think about when you set them up so that you will avoid or at least minimize family fights in the event of your incapacity.

After having dealt with the importance of Power of Attorney documents which protect you during your lifetime, we then turn to what happens after your death. We will be introducing you to the importance of a Will and the problems which are likely to result if you die without having one. We will then examine the careful thought that must be devoted to the various components of your Will in order to avoid fighting within your family after you die. Our discussion regarding the components of your Will will extend to a number of issues including executors, dealing with the personal items which you treasure, guardianship of your young children and a number of other important matters.

The discussion will then pass to various estate planning considerations. Within this discussion you will read about the difference between giving your assets outright under your Will as

opposed to setting up a trust in your Will. Just how much freedom do you really have, to dispose of your assets in your Will? Can you cut out your spouse? Can you cut out a child? You will read about the answers to such questions. Your attention will be drawn to methods of giving your property to others without using your Will, such as in the case of joint ownership of property. You will see how the joint ownership mechanism works.

You will see how important it becomes to review your Will if you wish to avoid family disputes. We will examine the important implications of marriage, separation and divorce. Before leaving the subject of estate planning considerations, we will touch upon the dangers of homemade Wills and the dangers of changing your Will without professional advice.

We will focus upon organizing your affairs so that your family will not be left confused and unprepared in the event of your unexpected incapacity or death.

We will then examine how fights can occur as a result of inappropriate assumptions which people commonly make in planning their estates.

Under the heading of inheriting turmoil you will see some real life examples of just how wrong things have gone for some families.

We will then provide suggestions and strategies to consider when you wish to accomplish a number of things such as cutting out a child, providing a fair and reasonable benefit to a caregiving child, avoiding inadvertent inequality among those who are to benefit from your estate, and dealing with the family home and the family business.

We are dedicating this book to the loving memories of Les' mother Rose, and Barry's father Abe, each of whom were a major source of inspiration for the creation of this work. We are also dedicating this book to our loving families, and thank them for their patience and support during the long hours which we spent in preparing our book.

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THE CONTINUING POWER OF ATTORNEY FOR PROPERTY

Let us begin by discussing the Continuing Power of Attorney for Property. As previously mentioned, we are using the term Continuing Power of Attorney for Property to define the type of Power of Attorney that will survive your incapacity. However, you should be aware that different Provinces use various terms to describe this type of document. For example, the Province of Ontario uses this terminology, but other Provinces may use the term "Enduring Power of Attorney for Property" to define the equivalent document. With respect to the Province of British Columbia, legislation has been passed with respect to the subject matter of incapacity, the result of which has created a term known as a "Representation Agreement". Representation Agreements replace and enhance what had been termed an Enduring Power of Attorney prior to the implementation of this legislation. In order to obtain accurate advice with respect to the ability of such agreements to survive incapacity, you should be consulting a lawyer familiar with the applicable law. Regardless of which Province you are dealing with, the fact is that this important estate planning document allows you to appoint someone you trust to act on your behalf with respect to your financial affairs in the event you become incapable.

Many of us take our mental capacity for granted. As long as we are mentally capable, we can refinance or sell our homes, sign contracts, pay our bills, deal with our investments and make many other financial decisions. However, if we were to lose our mental capacity due to an accident or illness, it would become extremely difficult and inconvenient to deal with all of these matters in an orderly manner. This is why it is so important to have a legally enforceable Continuing Power of Attorney for Property. This document will allow the person or persons appointed on the document to deal with all of these financial matters, if and when we become incapable of looking after these matters ourselves.

A few years ago a financial planner came to our office. She told us that she had been advising many of her young clients not to worry too much about this area of the law because, according to the reasoning of this financial planner, those young clients were healthy and could easily look after their own financial affairs. According to this financial planner, a Continuing Power of Attorney for Property was something elderly people had to consider. She felt that her younger clients had plenty of time to consider this matter. However, in our meeting with her, we told her that her reasoning contained one very significant oversight: even though a young person may be healthy today and fully able to look after his or her financial affairs, no one knows whether a sudden illness or an unexpected stroke, or an unforeseen traffic accident or sports accident will occur. If any of these events occur, a financial nightmare can await the families of those who are unprepared.

When you are young and healthy you tend to think that if for any reason you are going to experience mental incapacity, it will not happen overnight and you should have lots of warning signs. This is exactly what the financial planner we just spoke about was advocating to her clients. In fact, in one of the seminars at which we had spoken, a member of the audience raised this exact point. Do you know what our answer to that person was? Traffic helicopters: you may ask "What do traffic helicopters have to do with a Continuing Power of Attorney for Property?" There are traffic helicopters because there are traffic jams. There are traffic jams because there are traffic accidents: sometimes terrible ones where people hit their heads against the windshield, and suffer serious injury, but do not die. A person in such a situation is very vulnerable because without a proper Continuing Power of Attorney for Property, there is no one in place who can automatically step in and manage his or her financial affairs. As a result, a potential financial nightmare awaits the family.



Not all serious injuries are traffic related. A baseball bat to the temple, a bad fall in a football game, a disastrous body check in hockey, a hard ball hitting you in the back of the head or a work related injury could all create the same problem. The emergency wards are full of people who suffer such unfortunate injuries and it should be remembered that people do not necessarily die from such injuries. In fact, the injured person may live for many years.

Not all injuries will leave you mentally incapacitated, although some of them might. You may feel protected because you have done a Will.



The problem is that your Will is only going to take effect when you die. A Will is of no help to you while you are alive. In our discussion we are talking about a person who is incapacitated, not dead. The scary thing is that if you own assets such as stocks, bonds, mutual funds,

real estate, a business, a bank certificate or a bank account, all of these assets may be frozen in the event that you become mentally incapable, unless of course you have signed a proper Continuing Power of Attorney for Property.

In the event that you are found to have lost your mental capacity, and on the assumption that you do not have a Continuing Power of Attorney for Property in place, someone will have to apply to be named as your representative to act on your behalf with regard to your financial affairs. Depending upon where in Canada you live, the appointment of your representative will follow certain legislated procedures. Of course, you must recognize, from the point of view of your family, and from the point of view of those for whom you care, all of your assets could be frozen and could be under governmental jurisdiction until the appropriate representative is appointed. For illustrative purposes, let us use the Province of Ontario as an example.

In discussing this example, it must be remembered that the procedures in other Provinces differ from the procedures in Ontario.

It is difficult to summarize the laws of a Province in one paragraph. Briefly stated, Ontario law provides that when a doctor in what is defined as a psychiatric facility, or when a capacity assessor, determines that a person has lost his or her capacity, the results of such determination are forwarded to an office of the government of Ontario known as the Office of the Public Guardian and Trustee.

Upon receipt of such notification, that government office automatically takes steps to take control of the management of all of that person's financial affairs and property. Through this procedure, the Office of the Public Guardian and Trustee becomes the statutory guardian of that person's property.

If someone, such as a spouse or a child, wishes to replace the government guardianship of that person's property, such spouse or child must apply to the Office of the Public Guardian and Trustee to take over the financial affairs of the person who was determined to have been incapacitated. The application will of necessity involve the preparation and submission of a management plan acceptable to the government, the submission of a filing fee of several hundred dollars, and possibly, the applicant may have to submit a bond, depending upon the determination of the government. It must be realized as well that the government does have the discretion to either reject the application totally, or to grant it, but on very limited terms. You should be aware that had the incapacitated person taken the precaution, prior to the onset of his or her incapacity, of preparing a continuing Power of Attorney for Property which covers all of his or her assets, all of these procedures and expenses could have been avoided. Under Ontario law, this type of Power of Attorney terminates any government involvement in the financial affairs of the incapacitated person.

From the above comments, it becomes apparent just how important it is to have a proper Continuing Power of Attorney for Property in place in order to protect your assets from government intervention. If you are seriously interested in obtaining this type of prevention, you must realize that your Power of Attorney must be drafted in compliance with the formalities dictated by the legislation of your Province. Every Province has power of attorney legislation.

The law concerning the Continuing Power of Attorney for Property is complicated. In order to make it easier for you to understand the complexities in this area of the law, we would like to highlight the following points:

1. The word "Attorney" in a Continuing Power of Attorney does not mean that you have to appoint your lawyer. You can appoint a trusted family member or friend. Although you are giving someone authority in this document, it does not deprive you of the ability to act on your own behalf as long as you are capable.
2. Your Will and your Continuing Power of Attorney for Property are separate and distinct documents. One does not replace the other, but you are certainly allowed to appoint the same person to represent you in both your Will and your Continuing Power of Attorney for Property. Your Will only takes effect after your death and your Continuing Power of Attorney for Property is only effective during your life and terminates at your death.
3. On your Continuing Power of Attorney for Property you can appoint one or more persons who can act on your behalf if you become incapacitated. If you appoint only one person, consider a back up to the one whom you are appointing so that someone will be able to look after your financial affairs in the event that your primary appointee dies or becomes unable

or unwilling to act on your behalf. Remember that we are approaching this subject from the point of view of keeping your family together and in this context, the naming of your attorney is a very serious matter. It should not be taken lightly. For example, if you are appointing all of your children as your attorneys, you should be aware of the difference between appointing them jointly, or on the other hand, appointing them jointly and severally. If your document appoints your children jointly, it means that all decisions will have to be made by all of your named children, acting together. On the other hand, if your document appoints your children as attorneys jointly and severally, it means that one of your children, acting alone, can make a decision without the others. Your own family situation will tell you which of these choices is best for you.

4. A Power of Attorney that you may have signed at the bank for banking purposes is not the same as the Continuing Power of Attorney for Property. The bank Power of Attorney may be acceptable for banking purposes, but a bank Power of Attorney may not be continuing. Even if a bank Power of Attorney is continuing, the fact is that a bank Power of Attorney will always be limited to the assets that you have with that bank. In such circumstances, the bank Power of Attorney would not be effective with respect to your home, your condo or any other real estate in your name and in all likelihood the bank Power of Attorney would not be effective with respect to any other assets which you own, to the extent that those assets were kept outside of that particular bank

You may find, as many people do, that it is helpful to have a bank Power of Attorney in addition to your Continuing Power of Attorney for Property. However, if this is what you intend to do, be very careful to look at the wording on any documents that you are signing. What you wish to avoid is a situation

where the wording on one of the Powers of Attorney accidentally revokes the other. Can you imagine what hardship would result if your Continuing Power of Attorney for Property were properly in place with all of the appropriate appointments, only to be accidentally revoked by the language on your bank Power of Attorney? This would mean that the assets in your bank would be protected but that all of your other assets would not be.

5. You may find that you will want to revoke your Continuing Power of Attorney for Property and of course you can always do this as long as you have your mental capacity. However, once you lose that capacity it will be too late to revoke your Continuing Power of Attorney for Property. If it is your wish to indeed revoke your Continuing Power of Attorney for Property you should speak to your lawyer to ensure that the revocation will be effective.
6. This subject is not only for seniors. Remember, even if you are in your twenties, and in excellent health, you run the risk that you may unexpectedly lose your mental capacity because of a motor vehicle accident or a sports accident. You cannot make a valid Continuing Power of Attorney for Property if you are under the age of majority.
7. The person whom you appoint as your attorney in a Continuing Power of Attorney which is drafted broadly enough to encompass all of your assets, will have the power to deal with your investments including the making of all appropriate decisions regarding those investments, and will also have the power to deposit cheques, to pay your bills on your behalf, and to deal with various other matters including your tax matters. Be very careful about limiting the powers which you give to your attorney in your Continuing Power of Attorney for Property. If the document is too narrow you will leave the

person whom you have appointed to look after your financial affairs, without all of the powers he or she will require to solve the various problems which could conceivably arise pertaining to your financial situation.

One example of a problem of this sort is where a Power of Attorney is limited to banking matters. We saw this example previously. The inability to deal with non-bank assets will in all likelihood create stress for your family and could eventually lead to conflict in your family. If you have concern as to just how much power to give to your attorney, we would suggest that you consult your lawyer.

8. The word "Property" in the phrase "Continuing Power of Attorney for Property" should not be taken to mean real estate alone. Property is a word that can describe any asset, such as an automobile, a bank account, a stock, a bond, or any security.
9. We cannot overemphasize how important it is to appoint someone whom you completely trust to represent you in a Continuing Power of Attorney for Property. If you do not trust the person, do not appoint him or her. The document is very powerful and the last thing you want is for the person you appointed to take advantage of you. If you select the wrong person to serve in this capacity, you will run the risk that the person whom you appointed may abuse his or her position, and may take advantage of you. In the event that there is no family member or close friend you completely trust to represent you, you might consider speaking to a representative of the trust company you deal with, to determine whether that trust company would be willing to act as attorney on your behalf. However, you should recognize that you will have to consider their requirements for compensation in order to carry out this function on your behalf.

CONCLUSION

Through our years of professional practice we have seen the erosion of family relationships, sometimes to the point of utter destruction of the family, for reasons which in many cases could have been avoided. Human emotion and sensitivity is such that it can take very little to commence driving a wedge between people who should really be loving each other, as opposed to bickering with each other. Just look at the photographs in your family album. Your daughter and your son running on the beach together; a family picnic or a family function, with warmth between brothers and sisters and parents and children. It is so tragic to examine evidence of such happiness, only to think that it can all be irretrievably destroyed. It does not take a sinister motive to create the damage. Destruction of your family can easily result from oversight, procrastination, trivialization of the real issues involved and disorganization itself. We are all in agreement on one thing. It is absolutely impossible for you to express your wishes after you have become incapable, or after you have passed away. If you remember nothing else from reading this book, remember only this: do not presume that you will always be able to repair the misunderstandings that occur, as you can right now. Hopefully this book has given you the motivation to put the planning of your affairs on the front burner, to get professional advice, and to confront all of these matters so that you can avoid conflict within your family.





"...your daughter and your son napping on the beach together; a family picnic or a family function, with warmth between brothers and sisters and parents and children... it can all be irretrievably destroyed... this book should give you the motivation to put the planning of your affairs on the front burner so that you can avoid conflict within your family."