



TAYLOR  
MACLELLAN  
COCHRANE  
LAWYERS

MAKING SERVICE A MATTER OF PRACTICE SINCE 1835



# WILLS AND ESTATE PLANNING

*The material in this booklet is a compilation of "in house" materials developed by Taylor MacLellan Cochrane and three brochures published by The Public Legal Education Society of Nova Scotia – reprinted with consent. Copyright 1997.*

## MAKING A WILL

Everyone should have a Will. It is the legal document that ensures that the wealth and possessions you have accumulated, great or small, are distributed as you wish. The following are points to consider in making a Will with your lawyer.

More important, it is your special provision for those you love, ensuring that each receives what you desire. Your Will is worth the extra consideration and time you must give to its preparation. It must be made with proper legal advice from your lawyer in order that your wishes are carried out.

## REASONS FOR HAVING A WILL

### **To Dispose of Your Property as You Wish**

If you have no Will, your property will be distributed according to the laws of the province in which you live. These laws are inflexible and may not take care of the people you wish to remember. The only way to be sure your wishes are followed is to have a carefully drafted Will.

### **To Permit Flexibility in Carrying Out Your Wishes**

You may have some item or personal treasure that you'd like someone to receive. Only a Will can make that wish a certainty.

A Will permits the use of trusts to aid in the financial affairs of your survivors.

A Will permits you to appoint the individual, called the Executor, who is to administer your Estate. The Court appoints an Administrator for those who die without a Will, that is, for those who die intestate.

In your Will you may grant broader powers of management and discretion to your Executor than a court-appointed Administrator would have.

### **To Carry Out Your Wishes Most Economically**

With most Estates, the Probate procedure is more straight forward and less expensive when there is a Will. A court-appointed Administrator will be required to secure a bond before he can serve, and any cost may come out of your Estate. An Executor appointed in your Will can usually serve without bond.

Certain income tax advantages may be available through the use of trusts created under a Will.

### **To Provide for Your Children According to Your Wishes**

Guardianship comprises of two components, guardianship of the person, and guardianship of the person's property. In your Will you can appoint a guardian for your minor children. In a Will you can create a trust for your children giving the trustee you name

broad powers to manage the assets of the trust for your children's benefit until they reach the age of majority or older, at which time the property may be turned over to them.

## GETTING IT DONE CORRECTLY

### **Who Draws a Will?**

Your lawyer should draw your Will. It is a legal instrument custom made for you. You wouldn't try to buy eyeglasses at a general store. Don't try to use a Will kit from a stationery store. The chances of it working are about the same as they are for the eyeglasses. Such legal Will kits may not answer all your questions or appropriately address your situation.

### **What Laws Apply?**

The laws of the province in which you reside at the time of death govern the disposition of your personal property. Real property (land, buildings, etc.) is governed by the laws of the province in which it is located. If you change your place of residence from one province to another, you should see a local lawyer about any possible changes which may be needed in your Will.

### **What is Controlled by a Will?**

All real and personal property owned solely by you is controlled by your Will. Life insurance payable to a named beneficiary is an exception. Here you have already decided on the disposition of

the insurance by naming a beneficiary. Joint ownership of property is not a substitute for a Will even though such property usually passes to the surviving co-owner.

Your real estate may be owned jointly with your spouse or someone else. This property will pass automatically to the surviving co-owner, if the joint ownership is with rights of survivorship. Check your title with a lawyer to make sure your spouse or other joint owners will not have problems getting a clear title.

## LEGAL TERMS AND WHAT THEY MEAN

**Administratrix or Administrator:** A person appointed by the Courts to distribute the property of a person who leaves no Will. A woman performing this function is called an Administratrix, a man, an Administrator.

**Bequeath:** To give personal property in a Will.

**Codicil:** A document modifying, adding to, or qualifying a Will and forming an integral part of a Will.

**Devise:** To give real property in a Will.

**Estate:** All the property, real and personal, owned by a person at the time of his death.

**Executrix or Executor:** A person named in a Will to distribute the property of the person who made the Will. A woman performing this function is called an Executrix, a man, an Executor.

**Gender:** His/her, single/plural.

**Intestate:** To die without a Will.

**Legatee:** The person to whom you leave personal property is your legatee. What you leave is a legacy.

**Personal Representative:** Executor and Administrator.

**Probate:** To prove, in Court, that an instrument is truly the last Will and testament of a person.

**Property:** Property includes all those things and rights which are the object of ownership. Real property consists of

land or anything attached to, or a part of the land, such as a house. All other property such as stocks, insurance, jewellery, vehicles, money, etc. is called personal property.

**Testament:** Another name for a Will. There is no legal distinction between a Will and a testament.

**Testatrix or Testator:** That is you, the person making out the Will. A woman making her Will is a Testatrix, a man, a Testator.

## DRAWING AND PRESERVING YOUR WILL

### Getting in Touch with Your Lawyer

For your appointment with your lawyer, have the following information ready:

- a. Full names, birthdays, and addresses of your closest relatives.
- b. Detailed and personal information and documents, which you possess, including insurance and annuity contracts. Include also a list of debts you owe or are owed to you.
- c. General outline of how you wish this property to be distributed. Don't overlook items of sentimental value such as books, jewellery, etc.

### Reading the Document

After your lawyer understands your wishes and has prepared your Will, you will both review it and make any appropriate changes.

### The Signing of Your Will

There are certain required formalities about the proper execution of the Will by the testator and the witnesses. Your lawyer will supervise this so that the laws of the province are complied with. This is a simple but vitally important step in making sure your wishes are carried out. Beneficiaries and their spouses may not be witnesses.

### Keeping Your Will Safe

To make it easier to carry out your wishes later, put your Will and the names and addresses of your relatives in a safe place. Perhaps your lawyer will keep it in safekeeping or you can put it in a bank safety deposit box. On your death, the bank will allow a person

with your key to open the box under the bank's supervision to find the Will. The bank will allow the person named in the Will as the Executor to take the Will but nothing else from the box. Make sure your family knows where it is. It would be a good idea to leave a note with your current papers telling where the Will and safety deposit box key are.

## CAPACITY TO MAKE A WILL

Because the act of making a Will has serious and binding consequences for the property of the Testator, rules have developed to ensure that a Will is made by someone with the necessary mental capacity to appreciate the consequences of their actions. In order for a Will to be upheld during Probate the maker of the Will must have had the "Testamentary Capacity" to make the Will. The requirements for Testamentary Capacity are:

- a. the Testator must understand the effect of making their Will;
- b. the Testator must know the nature and extent of their property;
- c. the Testator must recognize what individuals have a claim upon their Estate; and
- d. the Testator must realize what each beneficiary is to receive under the Will, and what claims have been excluded.

If there is a question as to whether a Testator meets all four requirements a lawyer may ask for a psychiatrist's evaluation to determine capacity. If a Testator lacks the required capacity to make a Will, their former Will can still be used if one exists. Failing that, their Estate must be distributed on an Intestate basis.

*More information on Intestacies can be obtained from a lawyer.*

## CHANGING YOUR MIND

### How Changes Are Made

Changes must be made as carefully as the original drawing of the Will. You cannot change your Will except by a new Will or Codicil.

The best way to revoke your Will is for your lawyer to draw a new one and include a clause of revocation. Don't try to make a change on the original and just initial or witness the change. Go to your lawyer when you wish to make changes.

### **When Changes Are Needed**

If you marry, your Will is automatically revoked unless it states it was made in contemplation of marriage. Of course when you have children you may wish to change your Will. The death of relatives, divorce, annulment or separation, change of residence, change of financial status, changes in the status of your beneficiaries, or changes in tax laws are all compelling reasons for reviewing and updating your Will. Your lawyer will help you make any necessary changes.

## **SOME FINANCIAL CONSIDERATIONS IN YOUR WILL**

---

### **Paying the Final Expenses**

Your Executor will have the power and obligation to pay your debts and funeral expenses. Arrangements for donations to science of vital organs or bodies should be made with the recipient hospital or medical school and made known to your next of kin and/or your Executor.

### **Making Your Gifts Free and Clear**

If you want your heirs to receive their legacies free of taxes, you may direct that such taxes be taken from your Estate and that they receive their inheritances free and clear.

### **The Problem of Mortgages or Liens**

If there is a lien or mortgage on a piece of property, your heir may have to pay it unless you specify that such charges are to come out of the balance of your Estate. Your lawyer should be informed about such mortgages or liens at the time he is drawing your Will.

### **Managing Finances Through a Trust**

A trust can serve many purposes of an Estate. You may want to create a trust in your Will to provide income over a period of time for your beneficiaries. Your lawyer will show you how it fits in with your other plans.

### **The Matter of Taxes**

There are presently no succession duties levied by the Province of Nova Scotia but in several other provinces a duty is payable on property transferred through death if the property is located in that province regardless of the residence of the deceased. For the purpose of these tax laws, the location of the head office of a Company in which you own shares may be important. There may be income tax payable both for the deceased's last year of income and on capital gains.

## **THINGS TO CONSIDER IN DISTRIBUTING PROPERTY**

---

### **The Manager of Your Estate**

Your Executor is the most important person in carrying out your wishes. Your Executor should not be selected for sentimental reasons, but for having a demonstrated ability in financial management.

The guardian and the executor are responsible for your minor children's affairs. You should make appropriate provisions if both you and your spouse die at the same time or your spouse dies before you.

### **When you Outlive Your Heirs**

Do you want your heirs' shares of your Estate to go to their heirs, back to your estate, or to a cause such as your Church or University? You may do as you wish but you must state your intent.

A Testator will often direct that, if a beneficiary is unable to receive a legacy, that part of the Estate will pass to a charitable institution.

## **TAKING CARE OF THE LEFT-OVERS**

---

If you fail to distribute all your property in your Will, the laws of the Province will dictate how the distribution will be completed. Consider these two possibilities:

- a. Suppose there are some items of your personal property that you have overlooked. To whom do you wish these to go?
- b. Suppose someone to whom you

left a portion of your Estate dies before you do. Will that share go to that person's heirs or back to your Estate?

*Your lawyer will help you carry out your plans in either event.*

## **WHEN THERE'S NOT ENOUGH MONEY**

---

If you think your Estate may not be large enough to go around, you can establish an order of priority on your bequests. Similarly, if there may be more money than you envisioned, you can make plans for it as well. Keep your lawyer fully informed. Your lawyer can advise you about such contingencies.

### **Looking After Your Family**

You don't have absolute freedom in making up your Will. The law expects you to consider your family and to ensure that they are properly treated. Spouses are protected by the Matrimonial Property Act, and they, and your children are eligible to apply for relief from the Supreme Court under the Testators' Family Maintenance Act if the Will fails to provide for them adequately.

### **Gifts to Charity**

If you wish to aid a cause in which you have a strong faith or which has had an important influence in your life, you may do so in your Will. Many people use this means to support causes in which they have an interest, and of which they want to be forever a part. Gifts of securities to charities have tax advantages.

## **THE APPOINTMENT OF AN EXECUTOR/PERSONAL REPRESENTATIVE**

---

### **What is the function of the Position?**

The legal title of your Estate (everything you own) will pass to your Executor after your death. The Executor may act as Trustee for the heirs and beneficiaries of your Estate. He or she will gather together all your assets, pay your outstanding debts and taxes, and then distribute your money and property according to the instructions in your Will.

## What if You Don't Appoint an Executor?

If you don't name someone as an Executor in your Will, the Probate Court (at the request of your heirs) will appoint someone to fill the Executor's role. This person will be called an "Administrator". It's best to name an Executor in your Will because then you can be certain that your Estate will be handled by someone you know well – someone who is familiar with your property, family, and your wishes. Also, you can give broader powers of administration and discretion to your Executor than a court-appointed Administrator would have.

## WHO TO CHOOSE?

### Family and Friends

Most people ask a family member or close friend to act as their Executor. However, be sure that the person you choose has the time and ability to carry out the many duties of Executor. Overseeing an Estate is a complex, time-consuming job, and may include responsibilities that last for years.

The best Executor is a trustworthy, reliable and competent adult, ideally one who has some knowledge about your business affairs. Appoint someone who is likely to outlive you. It is also a good idea to appoint someone who lives in the same province as you do to reduce inconvenience and administrative expenses.

Your spouse, a friend, family member or heir may be an appropriate Executor. Indeed, it is common practice to name your spouse or main heir as Executor.

### Your Lawyer as Executor

It is possible to name your lawyer as Executor but he should be asked about his availability and willingness.

### Professional Executors

If your Estate is quite complicated or you don't have a relative or friend who can act, you may want to appoint a Trust Company as Executor. You should check this with the company first, though. If you don't, the company might refuse to act as Executor upon your death.

Most Trust Companies have experience

in estate planning, so their advice could lead to important tax savings and avoid administrative problems. Also, because such companies are strictly regulated, you can be assured that your Estate will be handled properly and legally. If there's a chance that a problem will arise among your heirs, a Trust Company might be a good choice because it would be an impartial Executor.

Possible disadvantages of using a Trust Company are that they usually charge the maximum fee allowable, they tend to be conservative investors, and they probably won't be as familiar with your assets and beneficiaries as would a friend or family member. Any Trust Company being considered should be consulted about the management of any business that you may operate.

Consideration should also be given to the time involved in administering your estate when you choose an executor. For example, if you want to establish a trust with payments to be made for the care, education and benefit of your children, this may be a long-term commitment for an Executor; here you may want to consider a Trust Company rather than an individual who may not be able to discharge this function.

### Must the Executor Accept?

An Executor appointed in your Will can refuse to act (*which is called "renouncing"*). But if the person you choose is not approached until after your death, and then refuses, the Court will end up appointing an Administrator.

Because an Executor named in your Will may be unwilling to act you should always get their consent before making the appointment. It is also prudent to appoint an alternate Executor to ensure the administration of your Estate is carried out by an appointee of your choice.

### Joint Executors

You can also appoint more than one Executor (called "Co-Executors") to share the responsibility. The Co-Executors would have to agree on all decisions and both, or all, would have to sign all documents unless otherwise provided for.

## POWERS OF ATTORNEY

Who would handle your affairs if you had to leave the country for a while? Or if you were in a car accident or badly injured? Or if, as you get older, you have difficulty getting around?

The following explains how you can give someone authority to act on your behalf through a Power of Attorney. It contains general information on Powers of Attorney, their uses and their limitations.

### 1. What is a Power of Attorney?

A Power of Attorney is a legal document which allows you to give another person authority to act on your behalf.

If you are the one giving someone the authority to act on your behalf, you are called the Principal. If you are the one receiving the authority, you are called the Attorney.

*Note:* if you give someone a Power of Attorney and remain competent you can still act on your own behalf. You still have control of your affairs. You are still free to deal with your property, bank accounts and investments.

### 2. When would I use one?

Illness, physical infirmity, or some other reason may make you unable to deal with your affairs. For example you:

- are in the armed forces and are in the armed forces and are posted abroad and need to give your spouse the authority to complete the sale of your home.
- contract an illness and wish to give a relative, friend or lawyer the authority to act on your behalf while you are ill.
- are elderly and cannot get around very well. You may wish to give a friend authority to make deposits to, and withdrawals from your bank account.
- are travelling away from home for a long time. You want to give a lawyer or some other person the authority to deal with your affairs while you are away.
- have impaired vision or other physical or mental disability.

### 3. Who can be my Attorney?

Anyone who is 19 or older and who is mentally competent can be your Attorney. Choose someone whom you trust and who will carry out your wishes.

If you do not wish to give a relative or friend Power of Attorney, you can appoint a lawyer, bank or Trust Company as your Attorney.

Depending on the circumstances, the Public Trustee may agree to act as your Attorney. The Public Trustee is an official appointed by the provincial government. The Public Trustee's office manages the affairs of persons who, for one reason or another, are unable to manage their own affairs.

### 4. What are the legal requirements?

The Principal and the Attorney must both be at least 19 years old and must be mentally competent. They must be able to understand what it means to give a Power of Attorney.

The Power of Attorney must be in writing. It must be signed by the Principal and it must be sealed. Sealing means that a red seal is attached to the document opposite the Principal's signature.

Often, it is signed by another person who is a witness. This is not a legal requirement but the usual practice.

An enduring Power of Attorney must be witnessed. The witness must be at least 19 years old and must not be the Attorney or the Attorney's spouse.

The document does not have to be signed by the Attorney.

### 5. What if I am unable to sign it?

You can place your mark on it. A mark is a cross or other symbol in place of a signature. A witness should sign an affidavit (a written statement) stating that the mark was made by you (see also question 6) and with your consent and understanding.

If you are visually impaired, the contents of the document should be read to you before you sign it or place your mark. A witness must sign an affidavit that the document was read and understood by you before you signed it or placed your mark on it.

### 6. What is an affidavit?

An affidavit is a written, sworn statement. The person making the statement swears to the truth of its contents before a Notary public, a Commissioner of Oaths, or a lawyer.

Persons other than lawyers may be appointed as Commissioners. There is usually a Commissioner in the local Provincial Court Clerk's office, in the Town or City Clerk's office, in government offices, in hospitals, and in homes for special care.

### 7. What powers will my attorney have?

There are two types of Powers of Attorney:

**General:** A general Power of Attorney gives the attorney power to act in every capacity for the Principal.

**Specific:** A specific Power of Attorney gives the Attorney power to carry out specific acts only, such as to sell land or deal with a bank account.

**Note:** You must be sure that a specific Power of Attorney gives enough power to allow the Attorney to complete the task. For example, the power to purchase a piece of land should include the power to sign all documents necessary to complete the purchase.

The terms of a specific Power of Attorney will depend on what powers you want to give the Attorney, therefore there is no standard form. You or your lawyer will have to draw up the form to fit your specific needs (see also question 10).

### 8. Do I need a lawyer?

You should talk to a lawyer who can explain the legal consequences of giving a Power of Attorney. A general Power of Attorney is a unique, and a very powerful document. It is wise to have a lawyer draft it for you. The lawyer will tell you whether the terms in your Power of Attorney will allow the Attorney to do the task you require.

### 9. How much will it cost?

Lawyers' fees depend on the complexity of the instructions given, how long it takes to draw up the Power of Attorney and the number of consultations the lawyer has with you. Other costs of the Attorney may include:

- your Attorney may have out-of-pocket expenses such as postage, photocopy and telephone charges;
- if your Attorney is a lawyer, he or she will charge for the time spent acting on your behalf as your Attorney;
- the Public Trustee, banks and Trust Companies charge fees for acting as your Attorney. Fees are based on the amount of work, the value of your Estate and your income.

It is possible to provide for compensation for your appointed Attorney.

### 10. Can my Attorney use my bank account?

Yes, if you give him or her the authority to do so.

Banks have their own Power of Attorney forms. They may require you to complete them if you want your Attorney to do banking on your behalf. Generally, both the Attorney and the Principal must sign the bank's Power of Attorney form.

The bank form may limit the Attorney's powers to deal with particular accounts or it might include power to deal with investments and safety deposit boxes held by you. You should discuss your requirements with the bank's customer service representative.

You can obtain a copy of your bank's Power of Attorney form from any branch. If you do not understand any of the terms, you should talk to the bank manager, the bank's customer support representative or to your lawyer.

### 11. Can a Power of Attorney be used for the sale and purchase of land?

Yes, but the Power of Attorney must be recorded at the Registry of Deeds where the land is situated. The Registry charges a recording fee for this service.

A Power of Attorney authorizing the sale or purchase of land must have an affidavit (see question 6) attached to it before it will be accepted for registration. The affidavit is sworn by the witness or the Principal before a Notary Public, Commissioner of Oaths, or a lawyer.

Land transactions completed under a Power of Attorney document are not

valid until that document is recorded.

## 12. What happens if I become mentally incompetent?

There is a provincial law called the *Powers of Attorney Act*. It allows you to provide in your Power of Attorney that you wish the power to continue even if you become mentally incompetent. This is called an Enduring Power of Attorney.

If you have not so provided in the Power of Attorney and you become mentally incompetent, the power likely becomes invalid:

- If you have not stated in your Power of Attorney that you wish the Power to continue; or,
- If you made the appointment prior to the *Powers of Attorney Act* (25 May 1988). In this case, a guardian would have to be appointed to handle your affairs (see question 13).

If you have an existing Power of Attorney, pre-1988, you may wish to replace it with an Enduring Power of Attorney.

## 13. How does a Power of Attorney end?

**Notice by the Principal** – the Principal can revoke a Power of Attorney by giving notice to the Attorney

Notice by the Principal - the Principal can revoke a Power of Attorney by giving notice to the Attorney.

The notice must be in writing, dated and signed by the Principal. Organizations and companies dealing with the Attorney should be notified in writing that the Power of Attorney has been revoked. The Principal should ask the Attorney and anyone else who has a copy of the Power of Attorney to return it to the Principal.

If the Power of Attorney is recorded at the Registry of Deeds, written notice of the revocation should also be recorded.

**Notice by the Attorney** - the Attorney can give the Principal notice that he no longer wishes to act as Attorney. The Principal should notify the bank and others that the Power of Attorney has been cancelled and ask for all copies of the document to be returned.

**Mental Incompetence** - if the Principal becomes mentally incompetent, the Power of Attorney is invalid unless it is an Enduring Power of Attorney.

If the Attorney becomes mentally incompetent, this authority is invalid unless an alternative Attorney is appointed in the document.

A person who deals in good faith with the attorney and who does not know that the Power of Attorney has been revoked can rely on the Power of Attorney.

In the absence of an Enduring Power of Attorney, the Public Trustee may act for a person who becomes mentally incompetent. Generally, if you make your own choice you will find it more satisfactory.

**Death** - if the Principal dies, the Power of Attorney is cancelled.

If the Public Trustee is acting on behalf of a Principal who dies, that official will continue to act until a Court appoints an Executor or Administrator to handle the Principal's Estate.

**Bankruptcy** – if the Principal becomes bankrupt, the trustee in bankruptcy takes over all the financial affairs of the Principal and the Power of Attorney is cancelled.

If the Attorney becomes bankrupt, the Power of Attorney is not automatically cancelled. The Power of Attorney is cancelled only if the bankruptcy makes the Attorney unfit to carry out his or her duties.

**Time** - where a specific Power of Attorney is given to complete a specific task, authority under the Power of Attorney ends when the task is completed. For example, to purchase or sell a house.

Where a specific Power of Attorney authorizes the Attorney to act on an ongoing basis, the Power of Attorney continues until it is cancelled in one of the ways outlined above.

A general Power of Attorney may continue indefinitely or may contain an expiry date.

## 14. Do Powers of Attorney have to be recorded?

Recording is only required when a

Power of Attorney is used for land transactions. The Power of Attorney must be recorded at the Registry of Deeds. If it is not recorded, land transactions authorized by the *Power of Attorney* may not be valid (see question 11).

## 15. What are the risks in giving a Power of Attorney?

There is always the risk that the Attorney will abuse the Power of Attorney. He or she might use your property for his or her own benefit. The Attorney might deal with it in a manner which is against your wishes but which he or she believes is in your best interests.

Depending on the terms of the Power of Attorney, your Attorney may be able to withdraw cash from your bank accounts, buy and sell investments on your behalf, deal with your property and/or sign contracts on your behalf.

If your Attorney has power to deal with your bank accounts and investments, your bank will not usually inform you that cash is being withdrawn from your account unless large sums are involved.

It is important to understand the purpose for which the Power of Attorney will be used. It is a powerful document similar in nature to a series of pre-signed, blank cheques.

## 16. What can I do to prevent misuse of the Power of Attorney?

Your Attorney must be someone whom you can trust. Choose your Attorney carefully. Consider appointing two attorneys to act jointly.

If you own a lot of property, you might consider appointing a lawyer, bank or Trust Company to act on your behalf. Look carefully into the costs involved before you decide who to appoint.

Give a specific rather than a general Power of Attorney, unless your circumstances require a general Power of Attorney.

Check bank statements and cancelled cheques carefully. Place a limit on the amount that your Attorney can withdraw without additional authorization from you.

If you have investments, arrange for your investment dealer to keep you or

a trusted third party informed.

Make an inventory of your property, jewellery, savings, silverware, investments, etc. and keep it up-to-date.

If you are competent, keep informed about your affairs. Exercise caution in handing over all responsibility to your Attorney.

### **17. What can I do if my Attorney misuses the Power of Attorney?**

If you believe that your Attorney is abusing his or her position, you can cancel the Power of Attorney. (See question 13)

You can require your Attorney to give an account of how he has managed your affairs.

If your Attorney is using your property or money improperly or without your consent for his or her own benefit, you should talk to a lawyer and to the police.

Criminal laws punish those who take or use the Principal's property or money for their own use or benefit.

If you give an Enduring Power of Attorney and later become mentally incompetent, your Attorney may have to account for his or her management of your property. Anyone who believes that the Attorney is abusing his or her power may inform the Public Trustee or make an application to the Supreme Court of Nova Scotia. The Court can order the Attorney to give an accounting to the Court or to the Public Trustee. The Court can also order the removal of the Attorney and appoint someone else.

### **An attorney can voluntarily provide accounts for the Public Trustee.**

A Power of Attorney may include personal care matters such as choice of nursing home, or a preference for being allowed to remain at home, etc.

## **ADULT PROTECTION**

The *Adult Protection Act* provides for an adult who is found to be "in need of protection". A Family Court judge may inform the Public Trustee that the adult's guardian or Attorney is neglecting, or dealing with the adult's property in a way which is not in the

adult's best interests. This only applies where the Principal is an "adult in need of protection".

### **Adult Guardianship**

In Nova Scotia the *Incompetent Persons Act* sets out the procedure for appointing guardians for adults who lack the mental capacity to manage their own affairs. The appointment of a guardian requires a Court Hearing to establish if the individual is still capable of administering their Estate. The guardianship process may be commenced by a relative or friend or certain government officials.

Guardians are entrusted with the full care and control over the person and the Estate (the assets) of the adult for which they are appointed. Their duties include the payment of all just debts owed by the individual; the receipt and settlement of all accounts due to the individual; and, if required, the sale of any real property (which requires specific Court approval). The primary purpose of a guardian is to manage the Estate of the person in their charge "frugally and without waste" and to apply the profits to the maintenance of their charge and their family.

### **Adult Protection Act**

Once an adult is unable to manage his own affairs, he may become subject to the *Adult Protection Act*. This Act applies to all individuals above the age of 16 who are the victims of abuse or neglect or who are unable to care for themselves in their homes due to infirmity or disability. The Act provides for investigative procedures when a report of an adult in need of protection is received.

If a person is found to be in need of protection he may be given care by the Province, including placement in a facility to prevent neglect, abuse or to provide necessary care.

If there is no guardian to care for the individual, or if the guardian is neglecting or abusing the individual, the Public Trustee may assume care and control of the individual and his/her Estate.

### **Hospitals Act**

Patients in hospitals are subject to the provisions of the Hospitals Act respecting one's ability to manage their affairs

or consent to medical treatment. Patients who have extended stays in hospital, or those who are suspected of being mentally incompetent may be examined by a psychiatrist to determine if they can still consent to treatment and manage their Estate. If the patient is found to be incapable of managing their Estate, and no guardian or Attorney has been appointed (see section respecting Enduring Powers of Attorney) the Public Trustee can assume control of the patient's effects and property.

If the patient is also found to be incapable of consenting to medical treatment this Act allows the spouse, next-of-kin or the Public Trustee to make treatment decisions for the patient. This list of decision makers is only resorted to where no appointment has been made under the *Personal Directives Act*.

### **Personal Directives Act**

There has been a change in the legislation and the *Medical Consent Act* has been replaced by the *Personal Directives Act* – an act that came into force in April, 2010.

Although the *Personal Directives Act* revoked the *Medical Consent Act*, it did grandfather in any consent forms previously made under that *Medical Consent Act* before April, 2010.

The effect of the new *Personal Directives Act* was to allow a person to appoint a competent adult to make decisions for themselves when they are no longer able to do so. The decision-making authority covers everything the old *Medical Consent Act* did but broadened the authority to include issues that related to one's personal care. For example, the type of care-giving services, the choice of home care, the choice of an assisted living location, and the consent for certain types of services provided in nursing home facilities. Remember, these would only come into effect if you could not speak for yourself.

More information can be accessed by going to the government website [www.gov.ns.ca/just/pda](http://www.gov.ns.ca/just/pda)

Two types of forms will be shown on this site:

**Short Form** – The first form simply appoints the delegate - you can only name one person for a specific decision. It is possible to name a person and then name an alternate to that person should the original be unable or unwilling to act. The first simple form only appoints your delegate and assumes that you have advised your delegate what you do and do not consent to with respect to your personal and medical care.

**Long Form** – The second form allows you to appoint your delegate but also allows you to state what you wish and do not wish to be included in that authority.

Section 4 of the long form allows one to simply state one's wishes with respect to their personal care, but does not appoint a delegate. This section 4 is often used where one does not have a family member or a friend to act for them, but still wants to make their wishes known to the health provider.

It is not necessary to have a lawyer complete this form as one is able to print it off the website noted above. It is advisable that you talk to your doctor about your decision-making, and imperative that you advise your delegate of your wishes.

## THE SOCIAL ASSISTANCE ACT

### **Designated Residences**

One of the purposes of the Act is to provide government assistance to persons requiring long term care, usually in a Home for Special Care (which includes nursing homes). The Act

provides that if you are able to pay for your own care you will do so. If you are unable to pay for part or all of your own care, you may be eligible for government assistance. If the government is called upon to assist in paying for all or part of your care, they will evaluate your assets.

Often, your most significant asset is your residence. Under this Act, your home can be exempted from the assets the government may consider when assessing the contribution you are required to make toward your own care. This is referred to as a "residence designation".

The Act defines a residence as the housing unit that an individual has ordinarily inhabited for the past two years. The residence also includes the immediate property surrounding the home. If you have owned your current residence for less than two years, it may still qualify for exemption if certain criteria are met.

### **Other considerations:**

- Spouses must designate the same residence.
- The residence designation may be made either before or after an application is made for government assistance.
- If you sell your residence, the proceeds are not exempt from consideration.
- Any disputes between individuals and the government will be resolved by the Supreme Court of Nova Scotia.

## MARRIAGE CONTRACTS

The *Matrimonial Property Act* of Nova Scotia gives married couples certain rights to "Matrimonial Property" especially the "Matrimonial Home". These rights are not always appropriate, especially in second marriage situations when one or both spouses wish to provide for children of former marriages. The Act permits spouses to contract out of its rules and to make their own rules. This is best done by a formal "Marriage Contract" – a relatively simple document in which the spouses/parties agree that each is entitled to dispose of the property he or she owns, subject to any limitations that are agreed upon.

Couples in common law or same sex relationships are not governed by this Act. They may, however, enter into a similar contract specifying their respective expectations and obligations. These are usually referred to as "Cohabitation Agreements" or Domestic Partnership Agreements. If the couple mutually agree, they can register such an agreement with a government office and obtain some of the same features as married couples.