

Keep The Province Out Of Your Affairs

Arrange for power of attorney so you can handle the finances of a spouse declared incapable.

By Jennifer Campbell
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Imagine this devastating scenario: On the drive home from Toronto after a long week of work, your spouse is involved in a head-on collision. Your loved one survives but is brain-dead and incapacitated.

Beyond the horrors of the tragedy, there are practical questions to be answered. And the most important one, according to Les Kotzer, a lawyer and expert in this field, is whether you have a power-of-attorney document.

"The thing no one seems to remember when they talk about estate planning is incapacity," Mr. Kotzer said. "People talk a lot about what happens on death, who inherits your assets, who your executor is going to be. But they forget that your will is only good when you die. It cannot help you while you are alive."

So, in the above scenario, who makes the financial decisions on your incapacitated spouse's behalf? You do, right? After all, as spouse you're the next-of-kin. Good logic, but it's not actually true unless you have a document naming you as having power of attorney. And if you don't? The province automatically gets the designation and starts acting on your spouse's behalf.

"There are a few misconceptions people have to get over," Mr. Kotzer explained. "The fact that you're married doesn't give you the right to sign for your spouse while he or she is still alive. The marriage licence doesn't give you that authority."

Often, spouses will sign power-of-attorney documents at the bank and think that covers them for all their assets, but those documents only cover them for the assets at the bank. And even if the bank has the mortgage, it's not covered by the document because it's not considered an asset.

People also think that if they have everything in joint names, one can sign if the other is not capable of signing, Mr. Kotzer said. While that works for joint bank accounts, it doesn't work for the "matrimonial home," which by law requires both signatures for mortgage renegotiation or selling the home. Even those who, for whatever reason, have their mortgage in only one name need both signatures to take any financial action with the house.

Mr. Kotzer can't count how many times he's received calls from panicking relatives with incapacitated family members.

"They say, 'My mother's incapacitated and she's made me executor. What do I do?'"

His response? "Guess what? You can't do anything unless you have the power of attorney. Executors are for wills only.

"They assume the person they're appointing as executor has that power. They don't."

It doesn't take much for the power to go to the province. As long as one doctor decides your spouse (or your parent, sibling, or any other loved one) is incapable of taking care of his or her financial affairs, that physician is required by law to notify the province by letter. The government of Ontario then becomes the statutory guardian of your spouse's property. It can happen quickly. But to prevent the government from getting involved in your financial affairs doesn't take long either. In fact, it simply

requires a few signatures, a few dollars and the help of a lawyer.

An alternative that Mr. Kotzer likes to suggest is one of his own power-of-attorney kits. It's in his interest to flog them, of course, but they do cover all the bases and do it for a little less (between \$15 and \$50 less for a couple) than many lawyers would charge to draw up a power-of-attorney document. As a lawyer himself, Mr. Kotzer tells people who have lawyers to talk to them about getting the documents drafted. But for those who don't and, as he puts it, for those who don't like lawyers, his kit is comprehensive and in Ontario it does the trick.

However, the document is useful only if the right people see it. A change in legislation in 2001 specifies that if the doctor is assured there is a proper power-of-attorney document, he or she isn't required to notify the province.

"The right document has to encompass everything the person owns," Mr. Kotzer said. "If you have the right document, the government's relationship is terminated."

Those caught without a document must prepare a detailed management plan of what they would do with their spouse's assets and submit it to the province for consideration. The province can also ask for a bond and managing fees that Mr. Kotzer has seen go as high as \$400. "And, they have the right and discretion to decide if you're able to manage your husband's assets," he added.

Mr. Kotzer recalls that his office once received a woman who had been declared incapable of managing her finances. She brought a letter sent to her son, from her doctor.

It read: "I have notified the office of the public trustee as I'm required to do by law. Her financial affairs will be managed by the public trustee, which will act in her interest. If you feel there's something your mother should purchase for her own use, please contact the government for the funds."

So her son, Mr. Kotzer noted, would have to go to the province to get money to pay for even the most trivial things, such as mother's hairdressing needs.

"Once the government takes over, it freezes your assets," he said.

In another case, a hospitalized man had been declared incapable. While his wife had power of attorney, she couldn't immediately find the document so she had to temporarily allow the province to take charge.

Eventually she found her document and after clearing things up, received a number of letters from her ailing husband's relatives. In his fragile condition, letters from his family in Ireland had served as a boost for him and he was distraught when they suddenly stopped coming. But, according to Mr. Kotzer, they hadn't actually stopped. It turned out that the province had redirected the mail. When the power-of-attorney proof came through, the wife received all the letters. However, by then her husband wasn't conscious enough to read them.

Her case highlights the importance of having power of attorney and the importance of being able to show the document to prove it. In 2001, the law was amended to say that where a doctor has reasonable grounds to believe a patient has someone with power of attorney for them, the doctor isn't required to send the declaration to the province. To that end, Mr. Kotzer's kit gives those who sign up a wallet card that serves as a legal document. It also has a serial number so those who need to can contact his firm and verify that the full-sized document exists. From Mr. Kotzer's research, he discovered that medical teams will first go for the wallet of an unidentified victim.

The scenario at the beginning also illustrates the importance of the other power of attorney, which

concerns medical, rather than financial affairs. This deals with what happens if you have to go into a hospital.

"The medical power appoints someone you trust to be your decision-maker," Mr. Kotzer explained. It could be the same person as for finances or a different one.

Mr. Kotzer's kits are available online at the Canadian site of www.familyfight.com . Financial kits, called the Encompassing Power of Attorney, cost \$50.00 plus shipping for one, and \$100.00 plus shipping for two (one for the husband, one for the wife).