Solving the Case of "What Else" After the Will in Estate Planning

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Estate Planning for the Average Wealth Client

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INTRODUCTION

So often when we think of estate planning, the other documents such as the Enduring Power of Attorney and Personal Directive are treated as something that the client needs but often given little thought. They are treated as an "extra" and most lawyers use standard precedents, with little thought about making it specific to the client. The process is often to just obtain the name or names of the persons who will act and attend to signing; that is, fill in the blanks and proceed.

But maybe we are not giving enough time and attention to an important aspect of estate planning for the client.

These are the documents that may govern many circumstances for your client in the future; the future that may see them unable to attend to make their own decisions. It will affect them when they are no longer in control of their lives. To the client, it may have more effect on them and be more important than the disposition of their estate on their death.

The Other Documents

In carrying out estate planning for your client, your task is not complete if you fail to discuss the preparation of these additional documents with your client in a comprehensive manner. Failure to do so may be tantamount to failure to carry out your duty to the client.

The presentation today identifies these documents to include:

1. Enduring Power of Attorney
2. Personal Directive
3. Supported Decision Making Authorization
4. Canada Revenue Agency Form T1013

In each case, the solicitor's duty is similar to that required when completing a will.

1. The solicitor must be competent to carry out the retainer
2. The solicitor must assess and record information about capacity
3. The solicitor must communicate appropriately with their client
4. The solicitor must investigate the relevant information

5. The solicitor must advise the client of the appropriate options and provide pertinent legal advice in order that the client makes an informed choice about their decisions

6. The solicitor must prepare documents that reflect the client's instructions and can be given effect as intended by the client

7. The solicitor must ensure that they are able to support the validity of the documents if called upon to do so

POWERS OF ATTORNEY

The *Powers of Attorney Act, R.S.A. 2000, c. P-20* (the "*Act*") gives us some guidance about issues that we should address in preparing a Power of Attorney for our client, but there are others that may not be evident by a review of the *Act*.

The Basic Provisions of the *Act*

The *Act* is relatively short. It contains only 16 sections. This might seem to support those who treat this part of estate planning lightly. However, it also leaves many areas undefined so that the prudent lawyer will need to provide paragraphs in the document to ensure the client is protected.

The *Act* also seems relatively straight forward and sets out the basic provisions of a Power of Attorney. Section 2 and 3 of the *Act* gives the "who" and the "what" of the document.

The donor must be an adult who is able to understand the nature and effect of the document.

The document must be in writing, dated and witnessed, with a statement of when it is to come into effect. The attorney must be an adult at the time of the signing. The *Act* provides circumstances under which a person may sign for the donor, if the donor is physically unable to do so.[1] The *Act* goes on to list which parties cannot witness and parties that may not sign on behalf of the donor. The document must state that it continues during an incapacity, if it is to be an enduring Power of Attorney.

The *Act* also provides that the power of attorney may be a continuing power of attorney in that it may come into effect upon a specified contingency. The standard practice for those clients wishing for the Power of Attorney to commence immediately is to add a statement that it comes into effect when the donor declares in writing that the Power of Attorney is to come into effect. For these purposes, a statement is included as a Schedule to the document. It may be signed later as well. When the Power of Attorney is to come into effect upon another contingency, such as incompetency, it is considered a

[1] *Powers of Attorney Act*, R. S. A. 2000, c. P-20 at s. 2(1) (b) (i) (B)