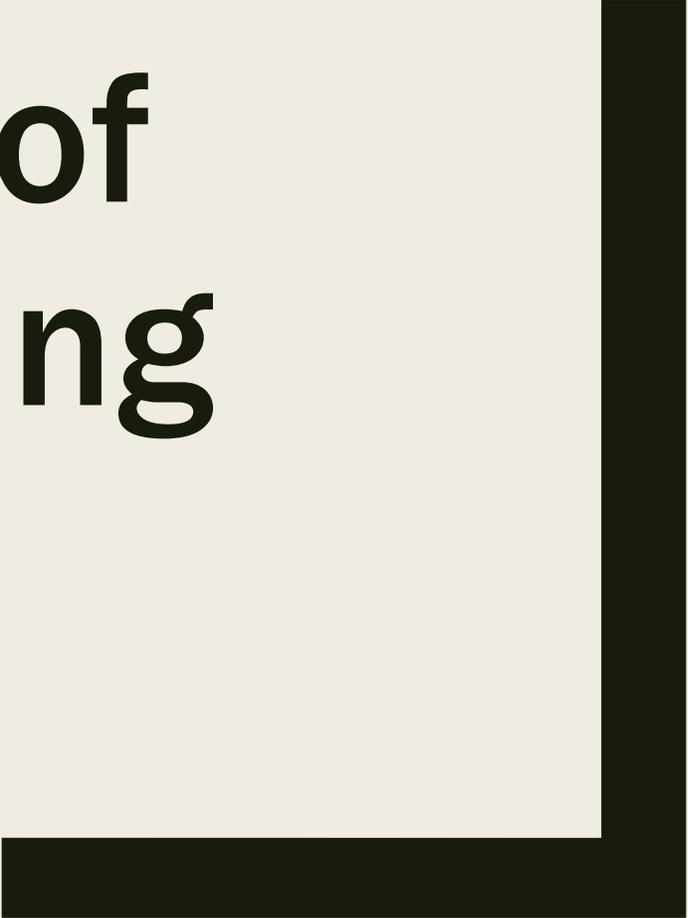




The Trifecta of Estate Planning

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Introduction

- Presentation covers three essential documents in estate planning
 - A. The Will
 - B. The Enduring Power of Attorney
 - C. The Personal Directive
- Each document has a specific purpose
- Will discuss each in some detail
- DISCLAIMER: What you were about to hear is to be considered legal information not legal advice. For your particular situation, please contact a lawyer, preferably one specializing in Wills and Estate.
- Also, we will be discussing only Nova Scotia law

A) The Will: The Basics

- A Will is a testamentary document properly executed by a testator/testatrix enabling him/her to dispose of his/her assets upon death.
- Nova Scotia's Wills Act provides that one must be 19 or older to execute a will.
- It also provides for 3 forms of Wills:
 - i. Common Form - signed by the testator/rix in the presence of 2 witnesses who also sign in the presence of the testator/rix and each other
 - ii. Holograph will – wholly in testator/rix's handwriting and signed by the testator/rix
 - iii. A “writing” declared by a judge to embody “the testamentary intentions of the deceased”.



A) The Will:

The Basics, cont'd.

- A testator/rix must have “testamentary capacity” to make a valid Will
- “Testamentary Capacity” involves having the ...
 - a) ability to understand the nature and effect of making a Will
 - b) ability to understand the extent of the property/assets in question
 - c) ability to understand the claims of persons who would normally expect to benefit from the Will, e.g. children
- The testator/rix must execute the Will of his/her own “free will”, not as a result of being co-erced to do so (Undue Influence)
- Assets that can be transmitted by will include all real property and all personal property to which a person is entitled, either at law or in equity, at the time of the person’s death
- There are other ways in which a person may effect a transfer of ownership effective on the date of his/her death, by naming a beneficiary or designation, for example:

A) The Will:

The Basics, cont'd.

- Life Insurance proceeds, by beneficiary designation (NS Insurance Act)
- Pensions by beneficiary designation* (NS Beneficiaries Designation Act)
- Registered Retirement plans (RRSPs) (NS Beneficiaries Designation Act)
- Registered Income funds (RRIFs) (NS Beneficiaries Designation Act)
- Tax Free Savings Account (TFSAs) (NS Beneficiaries Designation Act)
- Joint ownership (joint tenancy) with right of survivorship (common law)
- How is a Will revoked?
 - by execution of a subsequent Will
 - by a properly executed document that expresses the intention of revoking the Will
 - by the burning, tearing or otherwise destroying the Will by the testator with the intention of revoking the same
 - by subsequent marriage, except if the Will is declared to be made in contemplation of that marriage

A) The Will:

Executors

- **Executors are appointed under the Will**
- **There may be a single Executor, Co-Executors and Alternate Executors**
- **A named Executor may decline to act and be replaced by an Alternative Executor**
- **Duties of an Executor include:**
 - **gather all the Testator's property and papers**
 - **secure the Testator's property (change locks)**
 - **pay all debts, taxes and funeral expenses of the Testator**
 - **lastly, transfer of the remainder to the beneficiaries named in the Will**
 - **if the remainder is insufficient to cover all bequest, then the Executor distributes what is left on a pro rata basis**
- **Executors are entitled to a commission or fee, which is based on the gross value of the estate, up to 5% (which is rarely granted by the Probate Court)**
- **The fee is taxable in the hands of the Executor**

A) The Will

Probate

- The legal authority of the Executor is granted by the terms of the Will also by the common law, equity and statute, e.g. The Probate Act
- The Executor may be able to deal with many unregistered assets (e.g. household and personal effects) without going through Probate, particularly if the estate is small
- Some assets are incapable of being transferred without a Grant of Probate
- For example, in Nova Scotia, a parcel of land in the sole name of the Testator cannot be conveyed without the Executor first applying for and obtaining a Grant of Probate from the Probate Court and paying the applicable Probate taxes. The Grant of Probate is recorded in the Land Registration Office, at which point the Executor holds legal title to the property.
- Banks normally will not release financial assets without a Grant of Probate
- Probate process is public. The Will and the Inventory of the Estate assets and their values can be seen by anyone who pays the search fee



A) The Will:

The Testator's Family Maintenance Act (TFMA)

- **Some beneficiaries can contest a Will if they feel short changed**
- **In Nova Scotia, the surviving spouse as well as minor and adult children can contest by making application under the TFMA**
- **A Testator cannot cut his wife or disfavoured child out of the Will**
- **Spouse is entitled to 1/2 of the estate under Nova Scotia law**
- **Although Nova Scotia courts dislike adult children contesting a Will, they may deal with the issue of whether adequate provisions was made for them, taking into account the whole relationship, including:**
 - **the character of the adult child**
 - **his/her financial circumstances**
 - **other children's expectations**
 - **any services rendered by the adult child**

A) The Will:

TFMA, cont'd

- **With the advent of the Charter, it is against public policy to disinherit based on race, sexual orientation, etc.**
- **It is also against public policy**
 - **to bequeath property on certain conditions**
 - **to state that someone has to practice a certain religion**

A)The Will:

Intestacy

- If a person dies without a Will or if it cannot be found, it is said that he/she died intestate and the Intestate Succession Act applies
- In effect, the Government drafts a Will for you and it may not be what you want
- For example, common law partners will be left with nothing under an Intestacy
- If a common law spouse decides to fight that, it could cost \$80,000 in legal fees
- Registered domestic partners are treated like spouses under the ISA
- In Nova Scotia, spouses are entitled to \$50,000 or the matrimonial home and contents
- Then come the “lawful lineal issue”, e.g. children
- If no spouse or issue, the Law of Consanguinity kicks in, e.g. parents, siblings, nieces/nephews, then grandparents, etc.
- If no family, the Crown (Province) acquires the estate

B) ENDURING POWERS OF ATTORNEY

Definitions

- A Power of Attorney is a legal document that enables you to give another person authority to act on your behalf during your lifetime.
- The person granting the POA is known as the Donor; the person you are giving power of attorney to is known as the Attorney (does not have to be a lawyer).
- If you give someone your POA, way you may still make your own decisions until you're unable to do so.
- This General type of POA ceases to be effective if the donor becomes incapacitated.
- To address this, many provinces, including Nova Scotia, have enacted legislation that creates an Enduring Power of Attorney (NS Powers of Attorney Act)
- This document must clearly state that the Attorney's authority to act on your behalf continues even if you become mentally incapacitated.

B) ENDURING POWERS OF ATTORNEY

Definitions, cont'd

- A POA that is not an EPA becomes invalid and cannot be used if you, the Donor, become mentally incapacitated.
- In that case, another person may have to be appointed to manage your affairs. Prior to December 2017, that person was known as a Guardian.
- In December 2017, the law changed and the person appointed became known as the Representative.
- The Adult Capacity and Decision-Making Act was a significant departure from the Guardianship Act.
- The new legislation gives the incapacitated individual many more rights centered on autonomy and dignity and makes it more difficult to be appointed a representative.

B) ENDURING POWERS OF ATTORNEY

Definitions, cont'd

- Back to EPA's, there are basically two types:
 - One that becomes effective immediately, while the Donor is still competent
 - Or another type, known as Springing EPA, which is a specialized EPA that states at which point it will “spring” into effect (for example, upon the happening of a certain event).
- There are many reasons to have an Enduring Power of Attorney:
 - You are too ill to deal with your affairs and you need someone you choose to take over control until you recover
 - You have an illness that will reduce your mental or physical capacity in the future, and you want to arrange now for that future need
 - You want to make arrangements now while you are well and competent, in case something unexpected takes place (such as an accident) that might limit your ability to deal with your affairs.

B) ENDURING POWERS OF ATTORNEY

CHOOSING AN ATTORNEY:

- EPAs give someone else power to act for you.
- Therefore, be very selective in choosing your attorney
- Ensure he/she is of good moral character, and discuss with him/her your values and beliefs so that when you become incapacitated, he/she will have a guide in acting in your best interest.

DUTIES OF AN ATTORNEY:

- Your attorney has a duty to act loyally and take good care in carrying out what you have authorized him/her to do. This duty includes:
 - to stay within the authority you have given
 - to use reasonable care and skill
 - to act in your best interest
 - not to engage in self-dealing or profit personally

B) ENDURING POWERS OF ATTORNEY:

DUTIES OF AN ATTORNEY, cont'd

- In a nutshell, these duties are referred to as Fiduciary Duties of the attorney
- Black's Law Dictionary defines a Fiduciary as:
 - “one who must exercise a high standard of care in managing another's money or property”
- These duties arise from the laws of equity and common law and are not codified in the provincial Powers of Attorney Act.

B) ENDURING POWERS OF ATTORNEY:

ABUSE OF AN EPA:

- Even the most upstanding attorneys may be tempted to put their hands in the Donor's cookie jar, especially if there are many, many cookies.
- This often occurs when the Donor is frail, infirm or incapacitated and there are not many, if any, interested family members of the Donor nearby
- Financial abuse with an EPA is the most prevalent form of elder abuse; it is commonly committed by a family member of the Donor
- Ways to combat this is:
 - Ask your attorney to give you (or another trusted person if you become incompetent) regular updates on how he/she is managing your affairs
 - Require your attorney to file annual accountings with the Court
 - Put limits on how much can be withdrawn from bank/investment accounts

B) ENDURING POWERS OF ATTORNEY:

- **One last piece of information:**

Ned Chase, Q.C., a noted elder law practitioner in the Annapolis Valley has said:

“What I tell my clients is that the power of attorney is the most powerful document they will ever sign.”



C) THE PERSONAL DIRECTIVE

INTRODUCTION:

- A Personal Directive is a creature of statute and governed by the Personal Directives Act, Powers of Attorney Act and the Hospitals Act.
- The Personal Directives Act is a very powerful piece of legislation
- The maker of a Personal Directive can feel empowered to make one
- It is also a good catalyst for discussion about end-of-life issues
- The Personal Directive shares the same underlying purpose as an EPA; they both provide people with a legal mechanism for planning for incapacity
- Prior to the enactment of the PDA in 2010, a person of legal age and competent to consent could designate another person who is competent to make health care decisions for him/her in the event of incapacity.
- This was often known as an “Advanced Health Care Directive” and could contain the donors instructions, wishes, values and beliefs for the delegate to guide decisions in terms of health care decisions.

C) THE PERSONAL DIRECTIVE

DEFINITIONS:

- **“capacity” - the ability to understand information that is relevant to the making of a personal care decision and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.**
- **“delegate” - a person authorized under a personal directive to make, on the maker’s behalf, decisions concerning the maker’s personal care.**
- **“personal care” includes, but is not limited to, health care, nutrition, shelter, residence, clothing, hygiene, safety, comfort, recreation, social activities, support services and any other personal matter as prescribed by the Regulations.**
- **“statutory decision-maker” - a nearest relative or the Public Trustee.**
- **“nearest relative” - with regard to any person, the relative of that person first listed as follows: spouse, child (age of majority), parent, person standing in loco parentis, sibling, grandparent, grandchild, aunt or uncle, niece or nephew, other relative.**

C) THE PERSONAL DIRECTIVE

CONTENTS:

- The Personal Directive Act reflects a broad decision-making regime:
 - provides for a person with capacity and the age of majority to make a written directive appointing another person to be his/her delegate with or without written instructions
 - Upon the incapacity of the maker, the delegate is authorized to make decisions regarding the maker's personal care (very broad)
 - There is some potential for abuse, particularly if the delegate is also a beneficiary of the maker's estate
 - Objective is to try to replicate the maker's decisions
 - If no instructions are left, the delegate must act in accordance with what the wishes of the maker would be based on what the delegate knows of the values and beliefs of the maker; if not known, the delegate acts in the best interest of the maker

C) THE PERSONAL DIRECTIVE

CONTENTS, cont'd

- The Regulations under the PDA set out what are considered to be the best interests of the maker
- Great care ought to be taken in choosing a delegate who must use “good faith” in carrying out his/her duties
- Interestingly, a delegate may be instructed to consult with others, and also refrain from informing certain others (e.g. estranged child, first spouse, etc.)
- A delegate cannot deal with financial matters; required an EPA for that.
- Medical Assistance in Dying (MAID) cannot be put in the personal directive
- A maker can direct the delegate to refuse to give consent for treatments that would prolong the maker’s life (e.g. DNR)
- But the maker cannot request that the delegate authorize active steps to end your life

C) THE PERSONAL DIRECTIVE

STATUTORY PROVISIONS:

- If a person becomes incapacitated and does not have a personal directive, the PDA has a regime of statutory decision-makers; it starts with the “nearest relative” (See Definitions) and ends with the Office of the Public Trustee, which is the statutory decision-maker of last resort
- Statutory decision-makers derive their duties and responsibilities from the PDA or if a Court order is made by the Supreme Court

C) THE PERSONAL DIRECTIVE

SOME FINAL THOUGHTS

- The PDA does permit combining a personal directive with an enduring power of attorney made pursuant to the Powers of Attorney Act so long as it also conforms with the PDA.
- The consensus of Nova Scotia lawyers is to use two separate documents, appointing two different people to serve in the respective roles, particularly if there are strained family relationships
- A good reason to keep them separate is that often a person's EPA is filed with his/her financial institution, it is not appropriate for such institutions to know a person's personal directive instructions

C) THE PERSONAL DIRECTIVE

SOME FINAL THOUGHTS, cont'd

- You should store the original personal directive with your lawyer and keep a few certified copies with your important papers; a certified copy is sufficient to take to the hospital, if you are being admitted to be included in your hospital record
- Upon admission you're normally asked if you have a personal directive
- Finally, a delegate ceases to have authority:
 - when the maker regains capacity
 - upon the maker's death
 - Where the maker revokes or destroys the personal directive
 - where the Court declares it ineffective