

By John Johnson, LLB



# Your Aging Parents:

## *Special Considerations for Estate Planning*

**H**aving taken advice from our parents for a whole lifetime, the idea that we eventually have to give some back to them is a subtle but very important change in the way we do things. This subtlety is not lost on our parents, who must now receive this advice.

I am sure that most of you have noticed the pride that our elderly parents take in their own independence. Examples are all around us: the 85-year-old who is still driving his own motor vehicle; the elderly widow who is still able to cut her own grass or do planting in the garden. There comes a time, however, when the joy of this independence fades. Parent and child can sense it and neither wants to talk about it with the other because it illuminates an inevitable truth. In the legal world, lawyers get paid to have conversations with the elderly and advise them with respect to their estate plan or with respect to their future care issues. We always find that these senior citizens would very much like to be able to discuss these issues with their children. When we contact their children, we find that the children are just as anxious to talk about these issues with their parents. Each anticipates a reluctance of the other to discuss such matters — and thus the important things go unsaid.

Most elderly people who are planning their estates have a good idea of what they want to do with their money. For some elderly persons, however, a discussion about their future physical care is a tacit admission that their days of absolute independence may be over. If you have aging parents, the important goal is to maintain their independence as much as possible. This can start by giving useful gifts to your parents, such as a gift of snow removal services, lawn cutting or house cleaning. Your parents will never ask for these things, but they will usually accept them as gifts. This will accommodate their need for help and your obligation to look after them without any hurt feelings.

In this context, some issues invoke the need to preserve the safety of the parents. One of these is the driver's licence — truly the last bastion of independence for most elderly par-

ents. The thought of your 89-year-old mother driving the “elderly” to church on Sunday is a “clear and present danger” born out of a life of determined independence. If you feel uncomfortable tackling this issue, you need the help of the medical profession because doctors are by law obliged to report persons who are no longer fit to drive. You may need to stimulate that reporting obligation by contacting your parents' doctor to provide some “information that may be relevant.” The result of this may be that you will find yourself attending church more regularly.

Unfortunately, these conversations are not always possible because of the advent of dementia or Alzheimer's disease, which may require a different course of action. In previous articles, we discussed the powers of attorney for property and for personal care. The mental capacity required for a continuing power of attorney for property requires that the person giving the power knows what kind of property he or she has and its approximate value, and is aware of obligations owed to dependants. The donor must also understand that the person receiving the power will be able to step into the shoes of the donor in every way except making a will. The donor must not only be aware that the attorney must account for his or her dealings with that person's property, but must also understand that he or she may, if capable, revoke the continuing power of attorney. The donor of the power must have an appreciation for what will happen if the property is not managed prudently and the potential for misuse of the authority given to the attorney.

The capacity to give a power of attorney for personal care only requires that the donor of the power has the ability to understand whether the proposed attorney has a genuine concern for that person's welfare and appreciates that this person may have to make decisions for him or her.

If an aging parent demonstrates a significant lack of capacity, a different route may need to be followed. Under the *Substitute Decisions Act* of the Province of Ontario, a person seeking to look after the property or “person” of someone who

lacks capacity may apply to the Court to be appointed as guardian of that person. A formal capacity assessment is usually preferred. Health professionals who are qualified and certified as capacity assessors under the *Substitute Decisions Act* will perform this kind of examination for a fee.

Procedurally, notice of such an application to the Court is required to be given to other family members, who include the incapable person's spouse or partner, his or her children, and his or her brothers and sisters. It is very important that this process be open and that the family members discuss these issues long before a court application is made. The preparation for such an application can be quite onerous because of the requirement of a formal assessment and the preparation of a management plan for the incapacitated person.

It is also important to have consensus among the family members before any Court application is undertaken because a dispute in the Courts is extremely expensive. Where the application is for appointment as a guardian for personal care, it must be stipulated which personal functions are to be managed by the guardian (for example, will the restrictions apply to health care, nutrition, shelter, clothing, hygiene, or safety?). Normally a Court will seek to limit the functions that are assumed by a guardian to those which are actually necessary in order to preserve as much independence as possible for the incapacitated person.

The legal world of substitute decision-making is complicated and can be costly, but it does create a very protected atmosphere for those who need it. Sometimes (read "far too often"), family members try to avoid the legal expense of an application for guardianship or the preparation of a simple power of attorney by using a joint bank account. Father-son, mother-daughter, aunt-niece, etc., etc., or any combination thereof are often used as an inexpensive alternative to managing the affairs of the incapable person. The problem is that there are no statutory safeguards imposed on the management of joint accounts, and both joint signatures have equal access to the contents of the accounts. What was intended to help or accommodate the incapable person can often end up as a pre-inheritance when the incapable person ceases to have any recognition of his or her financial affairs. Often there is little evidence of either party's real intent with respect to the management of the account or what happens to the money when one of them dies. The bank account record will often refer to JTWROS, which translates as "joint with right of survivorship." The question that is often asked in the Court is whether the bank asked all of the necessary questions to determine whether the incapable person understood and intended that the contents of the account would go to the person who was helping to manage it. If your elderly person absolutely insists that you assist with the management of his or her money by way of a joint bank account, then it is important to ensure that there is some documentation that reflects your intended management and/or entitlement to the account. After the death of

one of the account holders, only the survivor gets to give evidence on the subject, and other family members may have something different to say about it.

Save yourself a lot of heartache now and encourage your aging parents to deal properly with these issues while they have the capacity to do so. 55

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## **Powers of Attorney**

### **Power of attorney — property**

A power of attorney for property allows your parents, as "donor," to empower you or any other person, called the "attorney," to exercise authority to manage their property. Once executed, the power of attorney for property is effective immediately and the attorney is able to act on behalf of the donor. Your parents may choose to restrict the authority by only having it come into effect after a certain date or when a specified contingency happens.

Your parents can control the power they want to give to you. It can be a wide, general power to manage their property or it can be restricted to specific assets.

This power of attorney will allow you to act on their behalf with regards to the management of their property in a variety of situations. Your ability to manage their property may prove useful for predictable events such as annual vacations or for unpredictable future events such as a possible hospitalization or illness that may render your parents physically or mentally incapable of managing their property and financial affairs.

Your parents may choose any one or number of persons to act as their attorney. Considerations such as the nature of the relationship and level of trust between your parent and their attorney are relevant to their choice, as are a number of other factors.

### **Power of attorney — personal care**

Similarly, the power of attorney for personal care allows your parents, the "donor," to empower another, the "attorney," to make personal care decisions on their behalf, but only in the event that they become incapable of making these decisions themselves. Personal care decisions include decisions

relating to health care, institutionalization and the termination of life support.

As well, your parents may choose any one or number of persons to act as their power of attorney for personal care. Considerations such as the closeness of the relationship and availability in the event of an emergency are relevant to their choice.

### Why are powers of attorney important?

These documents are an integral part of your parents' overall estate plan. They should be executed now — not at the last minute when your parents' capacity to execute one or both of these documents could be called into question.

### Court-appointed guardians

Substitute decision-making is governed by the *Substitute Decisions Act* of 1992. It prescribes various means by which a guardian can be appointed for a person who is incapable of property management or personal care. Such an appointment may be made by means of a power of attorney, where the person granting the power is still capable. In the absence of a power of attorney, the *Substitute Decisions Act* provides for a process for the statutory appointment by a Court of a guardian for property or for personal care who can step in and perform the function of a power of attorney in either instance. In the absence of an appointment of a suitable person, the Public Guardian and Trustee of Ontario will step in as the statutory guardian to make sure that all incapable persons are cared for.

## Travel news and adventure for expanding your horizons

### Northern Lights

We see them just occasionally in eastern Ontario, but in places like Nunavik and Alaska (especially Fairbanks), the northern lights – or aurora borealis – are becoming winter attractions through the end of April, delighting travellers with weaving, spinning displays of green, blue, purple and even red hues. Check out light-watching options at [www.nunavik-tourism.com](http://www.nunavik-tourism.com); 888 594-3424 and [www.travelalaska.com](http://www.travelalaska.com).

### Spring Ski New Hampshire

From March 14 to the end of the New Hampshire ski season, the Multi-Mountain Ski Passport gives you 10 resorts to choose from, all located within an hour's drive of each other – offering the flexibility to go wherever late-season skiing's the best. The Pass costs \$33 per day, with a minimum five-day purchase (children aged five and younger ski free), and is available at the resorts listed at [www.skinewhampshireusa.com](http://www.skinewhampshireusa.com); also call 800 887-5464 for ski information.

### Creative Thinking

Crafty travellers will want to head to Mississauga for the Creative Sewing and Needlework Festival, from April 22 to 24 (800 291-2030; [www.csnf.com](http://www.csnf.com)). Get hooked on knitting and crocheting, scrap happy with scrapbooking, and feel the bead...with beading! Plenty of lectures and demonstrations fill the schedule, with a VIP three-day pass just \$35.


### Self-Guided, in Style

From the secluded coves and ancient forests of B.C.'s Gulf Islands to the limestone villages of France's Dordogne region, Winnipeg-based Randonnée Tours (800 465-6488; [www.randonneetours.com](http://www.randonneetours.com)) lets you travel at your pace, whether you're biking, hiking or even sea kayaking. Their self-guided tours provide detailed route instructions and a variety of accommodation options, all based on your preferences – with the back-up of automatic luggage transfer, and help that's just a phone call away. Destinations include Europe, the US and Canada.

### Lobster Tales

From mid-May to early October, you can be a lobster fisher for the day with Shediac Bay Cruises (888 894-2002; [www.lobstertales.ca](http://www.lobstertales.ca)) in Shediac, N.B. You'll haul in a lobster trap, learn cooking techniques, watch a cracking demo, and then – of course – enjoy a lobster dinner served on board a heated and canopied lobster boat. Yum!

### Churchill Museum

A new addition to the Cabinet War Rooms in London is the Churchill Museum (01144 20 7930 6961; [www.iwm.org.uk](http://www.iwm.org.uk)) – the world's first major museum dedicated to the life of the British statesman and wartime Prime Minister. Focusing on both the private and the public sides of the man, the museum's opening comes 40 years after Churchill's death, and 60 years after the end of World War Two. 

*Travel Notables is compiled by Yvonne Jeffery.*