

Holding Mom's Hand:



When to step in and take charge

How a Power of Attorney can fulfill your parents' wishes when they can no longer help themselves.

Brought to
you by



*F*or the first time, there are more people over age 65 than under 15 in Canada, according to Statistics Canada.¹ While seniors are healthier and living longer than ever, inevitably the aging process takes its toll. The aging populace needs significant medical care, and many seniors may eventually become incapacitated, physically or mentally. Moreover, not only are they incapable of looking after themselves, they may not even be able to make decisions about their own care.

One of the challenges of looking after elderly parents is how to legally provide for their needs if they become incapacitated. Questions can arise, such as who decides what level of care is appropriate, who is responsible for managing that care, and how is it all paid for. Domenic Tagliola, a Tax and Estate Planner for TD Wealth, discusses what the adult children and aging parents both need to know to prepare for incapacity.

Q: Domenic, there must be a tremendous amount of anxiety on the part of adult children when their parents become incapacitated. How will they manage their parents' health? Who will have the authority to make legal and financial decisions?

Domenic Tagliola: That's all true. However, there is one effective legal tool available which takes a lot of the worry and anxiety out of the situation. It is the Power of Attorney (POA) which is drawn up by the person who wishes to give responsibility over their affairs to someone else. If you, as an aging person, draw up a POA document, you appoint an individual (usually a close relative but



**Domenic Tagliola,
BA, LL.B., TEP**

Domenic is a Tax and Estate Planner with TD Wealth. He was called to the Ontario Bar in 1995 and is a member of the Society of Trust and Estate Practitioners and the Estate Planning Council of Toronto. He brings clients comprehensive estate planning strategies that optimize the transfer of wealth to future generations and cater to their unique needs and circumstances.

not necessarily), called the attorney to manage your affairs. Now, there are two types of POAs, one for Property and one for Personal Care. The POA for Property enables the person or persons you appoint to manage your financial affairs, such as bank accounts, bill payments and the sale of assets. The POA for Property can take effect immediately after it is signed but, for the purposes of giving an adult son or daughter the power to manage your affairs only when you can't do it any longer, you can stipulate that the POA should take effect when an illness leaves you incapacitated. So, for example, you could draw up a POA for Property when you are still healthy in your 50s, but it would not take effect until you have a stroke when you are 78 and cannot make decisions for yourself.

In the above scenario, the POA for Property may allow the attorney to, for example, pay credit card bills, pay for medicine, cash cheques and access bank accounts, plus buy whatever medical care is needed, such as nursing visits or a wheelchair. In the longer term, it can give the adult child, as attorney, the legal authority to sell a parent's home, move the parent into a nursing home, and finance the parent's care over a longer time-frame.

The Power of Attorney for Personal Care deals with the type of care a person wants or doesn't want if he or she is incapacitated. This can include the type of food a person would want, whether they would prefer a private nursing room, or ideas about palliative care. It can also include under what circumstances the elderly person wishes to spend their last days in their own home or if he or she doesn't wish to be resuscitated under certain situations. But unlike the POA for Property, the POA for Personal Care only

“A POA can help any family at any time if the unforeseeable occurs. Imagine what can happen to a family where the breadwinner is incapacitated in a car accident and the spouse has limited access to bank accounts, investment accounts or assets.”

DOMENIC TAGLIOLA ,Tax and Estate Planner, TD Wealth

kicks in when medical staff can't receive these instructions confidently from their patient.

Q. Is a "Living Will" the same as a Power of Attorney?

DT: A Living Will was applicable before 1995 when the Substitute Decisions Act came into being with POA provisions. A Living Will is not a legally

binding document but spells out that, in case of incapacitation, the people who are morally bound to follow your wishes and what those wishes are. However, Living Wills still have validity to indicate someone's wishes. But, for me, it just makes more sense to do a POA for personal care since it is legally binding and the Living Will is not.

"No one else can legally touch any assets, access accounts or direct medical care other than the people designated in the POA documents."

DOMENIC TAGLIOLA

Q. When is the best time to draw up a Power of Attorney?

DT: Right now. A POA can help any family at any time if the unforeseeable occurs. Imagine what can happen to a family where the breadwinner is incapacitated in a car accident and the spouse has limited or no access to bank accounts, investment accounts or assets. But what we see happening a lot is that many people draw up a POA for themselves when they see what happens to their own parents or a relative when no POA is in place, and they realize the difficulties trying to provide and pay for care.

Q: What happens when family members can't agree on the type of care a parent needs?

DT: All families need to communicate their plans well before a crisis hits but the POA goes a long way to head off those types of conflict. For example, with blended families and second spouses, it is a real concern that there are competing family interests when dealing with the care — and the assets —

of a person who is suddenly infirm. The POA stipulates who is responsible for managing property or care. No one else can legally touch any assets, access accounts or direct medical care other than the people designated in the POA documents. So, if you draw up your POAs responsibly and appoint the people you trust to carry out your wishes and intentions as the attorneys, it should minimize the chances of serious family conflicts.

Q: It would seem that both types of Powers of Attorney have to work together to achieve the wishes and plans of the parent. Is that true?

DT: Yes. The POA for Care can stipulate what kind of care a person wants while the POA for Property can in turn allow someone to use the person's funds to fulfill those wishes. You may have, for example, a provision in the POA for Care that says, "in the case of an incapacitation, I want to remain in my home unless it is medically impossible for me to remain there." So, the person who is the attorney for the POA for Property, reads that and says, 'well, that means 24-hour nursing care or a home retrofit to take into account the disability,' and may decide to release the funds to make that happen. That's why you need both types of Powers of Attorney.

65

*For the first time, there are more people over age 65 — a record 5,780,900 Canadians — than under 15 in Canada.
(Statistics Canada)*

Q: What can happen if your parents become incapacitated and they haven't drawn up a Power of Attorney?

DT: The laws concerning this are different in each province. In Ontario, besides the difficulties in doing simple things like paying credit card bills and accessing bank accounts — all while dealing with the stress of caring for an ailing parent — the problems can really show up when you apply to a court to be granted guardianship of your parent in order to take control of his or her affairs. There are numerous steps and costs involved. It is a long process that may take many months to complete and has to be done in front of a judge with legal representation. Judges do not grant

guardianship lightly. You have to satisfy a judge that a guardianship order is absolutely the last remedy. And the judge may demand that if there is another avenue available for the family, they should explore that first.

Moreover, the judge will want to see a documented management plan for what you will do with property and assets in relation to your ill parent.

“In the worst case scenario, opposing family members can make competing applications for guardianship in front of a judge [if there is no power of attorney].”

DOMENIC TAGLIOLA

And if you have to go through this guardianship application, you will need to deal with the Office of the Public Guardian and Trustee, who will have to agree to the guardianship and to the management plan.

In addition, the court may seek out the relatives of the person who is incapacitated — spouse, children and siblings — for their agreement. So,

what happens if there is a disagreement between children and a second wife? What if the children and siblings of a person are at odds? This is obviously problematic if an ill parent is estranged from a family member, or there is no real bond between siblings anymore. What if distant relatives feel the need to have a say in your father's or mother's care, especially if you are in some kind of crisis situation? In the worst case scenario, opposing family members can make competing applications for guardianship in front of a judge. Needless to say, the complexity of this situation will generate expensive legal bills, eat up time and may well impair the level and quality of care for the person in question here — an elderly mother or father.

Furthermore, a judge will not just take your word that your father or mother is incapacitated. You will have to prove it. There has to be medical evidence presented and that means you must expend time and money for a medical professional to make an assessment of your parent, which could cost thousands of dollars or more for more complex cases. And even if everyone

is on the same side and no one is going to oppose your guardianship plan, by the time you're done with the lawyer's fees, you may have incurred \$10,000 to \$15,000 or more.

So, I can't emphasize enough the importance of meeting with your financial advisor and lawyer, speaking with them about your situation, your wishes and intentions as you age and drawing up a Power of Attorney for both Property and for Personal Care.

¹Statistics Canada: The Daily, "Canada's population estimates: Age and sex, July 1, 2015," Statistics Canada, July 1, 2015, accessed April 19, 2015, statcan.gc.ca/daily-quotidien/150929/dq150929b-eng.htm

DISCLAIMER: The information contained herein has been provided by TD Wealth and is for information purposes only. The information has been drawn from sources believed to be reliable. Where such statements are based in whole or in part on information provided by third parties, they are not guaranteed to be accurate or complete. Graphs and charts are used for illustrative purposes only and do not reflect future values or future performance of any investment. The information does not provide financial, legal, tax, or investment advice. Particular investment, trading, or tax strategies should be evaluated relative to each individual's objectives and risk tolerance. TD Wealth, The Toronto-Dominion Bank and its affiliates and related entities are not liable for any errors or omissions in the information or for any loss or damage suffered. TD Wealth represents the products and services offered by TD Waterhouse Canada Inc. (Member – Canadian Investor Protection Fund), TD Waterhouse Private Investment Counsel Inc., TD Wealth Private Banking (offered by The Toronto-Dominion Bank) and TD Wealth Private Trust (offered by The Canada Trust Company).

®The TD logo and other trade-marks are the property of The Toronto-Dominion Bank.

Brought to
you by

