

Powers of Attorney

What you need to know What you need to do

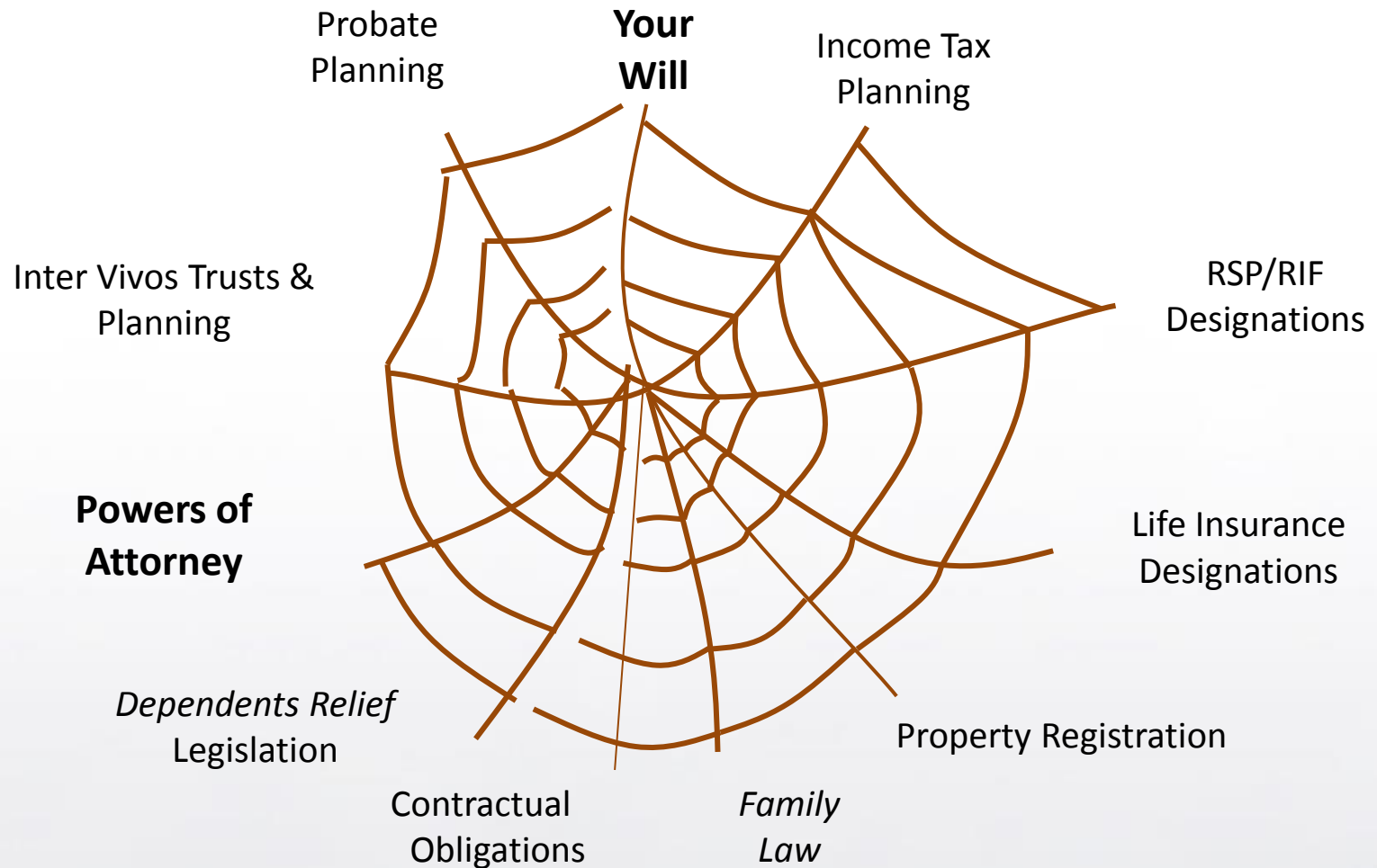
This presentation is intended to provide general information related to Will and Estate Planning and Powers of Attorney. It is not intended as legal, tax or other advice, and is incomplete in the absence of the accompanying oral commentary.



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Your Will & Powers of Attorney

- The cornerstones of an effective estate plan
- Your Will:
 - specifies what is to happen to your estate at your death
 - appoints an executor to administer your estate
- Your Powers of Attorney:
 - appoints an attorney or attorneys to act on your behalf in the event you become incapable of managing your own affairs



Without a Will

- If you die without a valid Will, provincial intestacy rules dictate:
 - To whom your estate will go
 - Who can be appointed to administer your estate
- Not necessarily reflective of your wishes or choice
- Lose control and opportunity to effectively plan



Without Powers of Attorney

- Should you become incapable of managing your affairs / making decisions about your care:
 - Important decisions about your finances and/or personal care may go unmade
 - Application to court to appoint someone to make decisions on your behalf
 - Can be costly and time consuming
 - Having a Will doesn't help



A power of attorney is a legal document that gives someone else the right to act on your behalf.



Types of Powers of Attorney

- For the management of your property and finances (2 different types)
 - Terminates at incapacity
 - Begins or continues at/ endures incapacity (this is our focus)
- For your personal care
- You may appoint the same or different attorneys for these roles



Power of Attorney for Property

- Traditionally ended at donor's incapacity
- Still exist
- Useful in certain limited situations (eg. business transactions)
- Focus will be on “continuing” or “enduring” Powers of Attorney



Power of Attorney legislation

- Provincial legislation
- Specific rules and terminology vary
- In Ontario, governing legislation is The Substitute Decisions Act



Continuing Power of Attorney for Property

- **Who can make a Power of Attorney?**

- 18+ years old and must:
 - Know what property you have and its approximate value
 - Be aware of your obligations to those people who depend on you financially
 - Know what your attorney has the authority to do
 - Know that your attorney must account for all the decisions they make about your property
 - Know that, if you are capable, you may cancel your power of attorney
 - Know that unless your attorney manages your property prudently, the value may decline
 - Understand there is the possibility that your attorney could misuse the authority



Continuing Power of Attorney for Property

- **What can your attorney do?**
 - You may give your attorney authority to make any type of decisions related to your property that you could make yourself – except make a Will
 - You can limit your attorney's authority by placing restrictions on their authority
 - Placing limits or restrictions may however mean your attorney will need to apply to court to become your guardian



Continuing Power of Attorney for Property

- **What are my attorney's duties & responsibilities?**

Your attorney must:

- Act with honesty, integrity and in good faith for your benefit
- Explain to you what an attorney's powers are
- Encourage you to participate to the best of your ability in all decisions
- Foster personal contact between you and supportive family and friends
- Consult from time to time with supportive family and friends and anyone giving personal care to you
- Put your financial needs first, followed by the needs of any dependents
- Keep accounts of all transactions



Continuing Power of Attorney for Property

- **When can my attorney begin acting?**
 - Immediately; or
 - Only when something specific happens (for example, you become mentally incapable)
 - Must take care in establishing “triggering” event
 - Hybrid: effective immediately, but donor provides separate written directions saying when document may be released to the donor



Power of Attorney for Personal Care

- Who can make a Power of Attorney?
 - 16+ years old and must:
 - Be able to understand whether your attorney has a genuine concern for your welfare
 - Appreciate that your attorney may need to make personal care decisions on your behalf



Power of Attorney for Personal Care

- **What can your attorney do?**
 - Your attorney can make personal care decisions including choices about:
 - Health care
 - Nutrition
 - Shelter
 - Clothing
 - Hygiene
 - Safety



Power of Attorney for Personal Care

- **What are my attorney's duties & responsibilities?**
 - Your attorney must follow any instructions and wishes you made when you were capable, whether or not they are in writing
 - You may include a "Living Will" provision
 - If your wishes and instructions are impossible to follow, your attorney must make decisions in your best interests



Power of Attorney for Personal Care

- **When can my attorney begin acting?**
 - Only when you become mentally incapable of making personal care decisions
 - No special procedure required
 - Your attorney may begin acting so long as you do not object and your attorney:
 - Has reason to believe you are incapable of making the decision
 - Explains to you, where possible, why a decision is necessary and what the decision is
 - Tells you that you have the right to object



Choosing the “right” Attorney

- An individual over the age of 18 (16 for Personal Care)
- Sole, co- or alternate attorney(s)
 - Where co-appointed may be joint or joint and several
- Public Guardian & Trustee may be attorney
- Certain people prohibited (Personal Care)
 - A trust company may act in respect of property only



Potential for Abuse

Understand there is the possibility that your attorney could misuse the authority
s8.(1)(g) SDA

Theft by person holding power of attorney
(s. 331 of Canada's Criminal Code)



In the News

- *Stealing from Mom and Dad: why power-of-attorney abuse against seniors is soaring and so easy to get away with* (Maclean's, July 2011)
- *Concerns over Power of Attorney Abuse* (All About Estates, July 2011)
- *Elder Abuse – Legal Options in Ontario* (Canadian Lawyer.ca)
- *Power Grab! Signing over authority to a power of attorney to a loved one has never been trickier – here's what you need to know.* (Wall Street Journal, May 2011)
- *P of A sells house, puts funds in joint account with mom* (Estates Law Canada, November 2010)
- *Jail term for theft by person holding power of attorney* (Estates Law Canada, June 2010)
- *Power of Attorney Abuse on the Rise* (Toronto Estate Blog, April 2008)
- *Abuse of Power of Attorney – A Growing Crisis for Seniors* (Vancouver Sun 2008)
- *Power of Attorney Abuse – Civil or Criminal* (FraudSquad.ca)
- *Signing Away Your Savings* (Maclean's, March 2011)
- *Rise Seen in Financial Abuse of the Elderly* (Toronto Star, October 2010)
- *Cases of Elder Abuse Will Only Rise* (North Bay Nugget, 2010)



What you need to do

- Ensure you:
 - have a valid up-to-date Will reflecting your wishes, personal and financial situation
 - choose an appropriate executor with the expertise, time and inclination to properly discharge the role
 - have valid up-to-date powers of attorney for both the management of property and personal care
 - choose an appropriate attorney or attorneys with the expertise, time and inclination to properly handle all responsibilities





Thank You!

