



## Legally Speaking: Planning for Incapacity

by Jackie Morris



None of us can predict when we might become incapable of managing our day to day financial affairs or when we might become physically disabled to the extent that we cannot sign documents. A simple fall off a ladder or a car crash can happen at any age with devastating legal consequences, let alone all the physical, mental and emotional ones.

The most important legal document everyone should have in place is a Power of Attorney, no matter what your financial situation is. Even if all assets are held jointly with your spouse, you cannot file tax returns, nor can you sell or remortgage a home. If your spouse becomes incapacitated and you don't have Power of Attorney you cannot fully deal with other assets without first applying to the court to become a committee, a costly and time-consuming legal procedure.

Given that a Power of Attorney is important to have in place, it should be done as soon as possible, before accident or illness renders you incapable.

**What is the test for capacity?** Many of you will have heard of the Mini Mental Status Exam often given by doctors. Its most memorable feature is counting down from 100 by 7's. Doctors use this test to screen for mental impairment and sometimes tell lawyers that a client/patient is not mentally capable of giving instructions for signing a Power of Attorney based on the exam results. That may indeed be the case.

However, the capacity test for Powers of Attorney is very specific and is now set out in the new law that came into effect in September 2011. It firstly assumes that you are capable. If there is some doubt, then you must demonstrate the following to the

satisfaction of the lawyer:

- your knowledge of your assets and their approximate value
- your knowledge of obligations to dependants
- your understanding that the person you've appointed can do anything that you could do with your legal and financial affairs with some important exceptions
- your understanding that, unless the attorney manages your affairs prudently, the value may decline
- your understanding that the attorney might abuse the trust placed in him or her
- your understanding that you may revoke the Power of Attorney at any time, unless you become incapable.

Underlying this test is the fact that you must know who you are, that you are talking to your lawyer and that you are discussing a Power of Attorney. No one else may help with answers or even be present.

When someone is in failing health, there may be good and bad days. There may be times of the day when the person is more alert. The lawyer need only be satisfied with responses when taking instructions and in witnessing the person's signature.

**Timing may be crucial, but the better plan is to not delay.** Get it done and tuck it away.