

# The Butler Bulletin

Butler Wills and Estates

September 2019

## *Can the Attorney do that?*

What your appointed representative can and cannot do under a Power of Attorney.

There are a lot of things that someone named under a Power of Attorney can do – access your bank accounts, pay your bills, file your taxes, and manage your pensions. However, there is also a long list of actions that your named Attorney should never take on your behalf.

People tend to be less familiar with the role of an Attorney than they are with that of an executor, which leads to costly mistakes, some of which are illegal. Let's take a closer look at some of the things Attorneys do that they shouldn't, and how to avoid them. Remember, in Canada the title "Attorney" means the person you've named to act on your behalf, not the lawyer that drafted the document. For the purposes of this discussion, we are considering an Enduring Power of Attorney, which is in effect if the person loses his or her capacity.

### ***Early Inheritance***

This is probably the most common error made by Attorneys, and is something we've discussed in newsletter articles before. Often an Attorney will sell an asset, such as a house or cabin, because the person they're acting for is no longer able to reside there. The action of selling property isn't an issue in itself, unless there is clause in the document specifically forbidding it. The problem arises when the Attorney either keeps the proceeds, or divides the funds among his or her siblings. On the face of it, dividing the money equally among everyone sounds fair.

It would be, except for the fact that the money does not belong to the Attorney. The funds belong to the person for whom the Attorney is acting, and therefore, the Attorney does not have the right to decide to give it away. Technically, this is theft by Power of Attorney, which is a crime under section 331 of Canada's Criminal Code.

Frequently, the Attorney does this because he or she believes this is what would eventually happen under the will. The rationalization is that since this division would happen anyway, the Attorney is following the person's directions. However, the will only takes effect once the person passes away, and the Power of Attorney stops being in effect when the person passes away.

At no time does the Attorney have any legal right to follow instructions in the will, unless the Power of Attorney document has a clause that states the Attorney is to divide the proceeds of any property sale according to the will. In this case, the person has given the Attorney specific permission to take this action.

### ***Change Beneficiary Designations***

The person for whom the Attorney is acting made beneficiary designations when he or she had mental capacity, whether for life insurance, RRIFs, in a will, or on another document. Changing their beneficiary designations is undoing a decision that they did not need help making, which is not part of being an Attorney.

When an Attorney changes someone's beneficiary designations, the Attorney is basically re-writing the person's estate plan. Changing one element of the plan can upset the proverbial estate planning apple cart.

The person may have made certain beneficiary designations to minimize the amount of tax coming out of their estate, to increase cash flow into their account to pay for care, or to be able to leave something for their loved ones. No matter what the reason is, the setup is what the person wanted and it is not up to the Attorney to revise it.

Some Attorneys argue that the setup isn't what the person wanted, and that they know what should have happened instead. Unfortunately, it does happen that people don't have everything set up the way they want when they lose their capacity. However, once the person no longer has their capacity, the window of opportunity has closed. The decisions about what should go where can no longer be made, whether by the Attorney or the person who needs assistance.

### ***Use the Assets for Individual Benefit***

This applies to money, vehicles, property, and any other assets that the person may own. It is obvious to most people that taking someone's money and keeping it is theft, but use of other types of assets is less well understood.

For example, using the person's vehicle for your own day-to-day needs is not acceptable. If the person is no longer able to live in their home, an Attorney is not permitted to let his or her friends or relatives live there rent-free.

Having someone – whether it be the Attorney or someone else – take advantage of the person's assets, the Attorney is breaching their fiduciary duty. The primary goal of any Attorney is to protect the person's assets, and make the most of what the person has. Using these assets for the Attorney's benefit directly contradicts this goal.

# DO

VERSUS

# DON'T

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## ACTING AS A POWER OF ATTORNEY

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Act reasonably, honestly, and in good faith

Maintain the confidentiality of the donor

Keep the donor's original will safe

File the donor's taxes

Consult a lawyer if you need help.



Mix the donor's money with your own

Let anyone other than a co-Attorney have access to the money or assets

Vote in a government election on behalf of the donor

Act when the document is not in effect

Invest in anything risky or experimental.

For more information about acting under a Power of Attorney, visit our [YouTube page](#), and don't forget to subscribe for notifications about new videos.

## From Lynne's Blog – Recording Important Info

Today I spent a couple of hours working on a client file in which two adult children are trying to become the guardian of their mother. The mom has dementia and recently had to move into care. The children both live in other provinces.

The biggest challenge faced by the family members right now is lack of information. They didn't know who their mom's doctors are, what prescriptions she needed or where she filled them, who has keys to her (now vacant) house, where she picked up her mail, how to get into her computer, whether she had a will or POA and if so, where they might be kept, whether she has insurance, and a million other important details.

This situation is in many ways similar to the job that an executor must do after someone has passed away. It can be a real struggle to understand and document someone else's whole life. It takes hours of searching, emailing, and calling people and odds are good that despite good intentions and honest effort, things can be overlooked. Talk about a frustrating job!

It doesn't need to be that tough. We developed a way for people to organize and record their own information so that anyone who has to take over for them - an executor, an attorney under a power of attorney, or a guardian - will have access to the important stuff. It's a coil-bound book of 94 pages, designed like a workbook for people to fill in. We call it "For My Family With Love". There are places to record the usual things lawyers want people to record, such as assets, debts, insurance policies, and bank account numbers. But it also has space for all of the things mentioned above - such as who has keys to the house and which pharmacy has your prescriptions on file. It also has plenty of space to record passwords, and even has a helpful list of digital assets to remind you of which ones you need to record.

This workbook is one of the consistently most popular items that clients request at our office. We have adult kids buying the workbook for their parents, and parents buying them for their kids, and plenty of people who buy them for themselves. If you want to check it out or perhaps get a copy for yourself, [click this link](#).

*Originally posted on [www.estatelawcanada.blogspot.ca](http://www.estatelawcanada.blogspot.ca)*

## Podcasts are coming back!

We've heard from several readers that they would like to have more episodes of the podcast.

Upcoming topics include:

- The difference between a Do Not Resuscitate order and an Advance Healthcare Directive
  - How to donate to charity in your will
  - What is taxation?
- Guardianship in Newfoundland

Also, keep an eye on our YouTube channel for the mini-series *Top 10*, where we count down the top 10 most frequently asked questions about a variety of topics, such as why estate planning is important for new families, the benefits of having an estate planning lawyer prepare your documents, and the most interesting celebrity estates.

## Question from a reader

*“Is it really that much extra work if I pass away without a will? If I had a will my son would still have to get probate, and everything would get given out, so what’s the point?”*

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The work involved when someone passes away without a will is more than just applying to the court, but that is definitely part of it. On the face of it, the amount of work that your family has to do after you pass away looks about the same. After all, the applications for probate (with a will) and administration (without a will) are very similar.

Let’s look more closely at the steps involved in each scenario to get a better understanding of whether or not it is actually more work for your family if you pass away without a will.

Applying to the court for probate or administration is a major step for any estate. As previously mentioned, the applications for probate and administration are very similar. However, there are a few extra steps involved in administration.

Both applications require the same basic forms. For probate, the additional documents that are needed are the original will and a Proof of Will. These are often simple to get. For administration, the applicant needs all the basic forms, plus a consent and renunciation from each person with the same right to apply as the applicant. Depending on the jurisdiction, the applicant may also need to obtain an administration bond, or file an affidavit to dispense with the bond. As you can see, the administration application already involves more paperwork.

One of the documents that both applications require is an inventory – this is a snapshot of everything in the estate, with the value on the day the person passed away. A named executor may be able to access bank accounts and such to obtain these values, on the understanding that they are the named representative of the person who passed away.

Without a will, there is no one named who can access the deceased person’s information, because no one has the legal right to it. Plus, everyone has to agree to as to who it is that will apply. This results in delays, which can cause extra fees. It also means that the applicant may have to file a supplementary inventory later, once they have access to the accounts. This is more work, and nothing can happen until someone is appointed.

Getting consents and renunciations isn’t always easy. Each person who has the same right to apply as the applicant must sign these documents in order for the applicant to file the application. In some cases, this is relatively simple. In other cases, it can involve tracking down cousins across the jurisdiction, and trying to get signatures from people who have no idea what is going on.

Once the person is able to get to the point where they can distribute the estate, having a will makes the process a lot easier. The executor simply needs to follow the instructions in the will.

On the other hand, an administrator must follow the provincial intestacy laws. This means he or she needs to become familiar with the law, or consult a lawyer. Yet again, this means more fees and more work.

Overall, having a will makes things a lot easier. Although your executor may have to go through the probate process, it is much more straightforward with a will than without.

## New! Regular Column

### Alzheimer Society

#### 10 COMMUNICATION TIPS

People with dementia may be confused, frustrated, frightened, unable to communicate or understand what is being said.

1. Identify yourself, e.g., "My name is... I'm here to help you get home."
2. Approach the person from the front.
3. Move slowly; maintain eye contact.
4. Address the person by name; speak slowly and clearly.
5. Present one idea at a time.
6. Repeat/rephrase responses to clarify what he/she is trying to tell you.
7. Ask questions requiring "yes" or "no" and allow time for a response.
8. Back up your words with actions using gestures.
9. Listen actively and acknowledge the person's emotional state.
10. Touching too roughly or quickly could cause increased stress.

Alzheimer Society offices are located in every province across Canada. To find programs and services in your region visit [www.alzheimer.ca](http://www.alzheimer.ca) or call 1-800-616-8816.

Every day we get questions from people who are caring for or living with someone who has dementia. Although we are in no way medically certified to treat dementia, estate planning often goes hand-in-hand with a diagnosis of dementia. Whether someone has a short opportunity to make their wishes known or a child needs to become the guardian of their aging parent, many of our clients are dealing with dementia.

In order to help our readers be more informed about this situation, we're adding a regular column to our newsletter about dementia. Groups like the [Alzheimer's Society of Canada](#) and [Home Instead Senior Care](#) have tons of resources to share. We intend to help spread some of the information they have to the people who need it.

Each issue of our newsletter will now have a section dedicated to dementia facts, diagnoses and treatment info, helpful resources, recent research, and more.

If you have a question you would like answered in the newsletter or a topic you would like us to address, please email [chelsea@butlerwillsandestates.com](mailto:chelsea@butlerwillsandestates.com) or submit your questions through the "contact us" link on our website. Any questions that are published will be anonymous.

To get started, here are the top 10 tips for communicating with someone with dementia, according to the Alzheimer Society.

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## Crocheted Octopi for Premature Babies

A volunteer group in Denmark known as The Octo Project has been helping hospitals in more than 17 countries. Since 2013, this group has been crocheting small octopi using premium cotton, and donating their creations to NICU wards around the world.

The group discovered that when premature infants hold the tentacles of an octopus, they are less likely to pull out cords and tubes. Seemingly, the tentacles are reminiscent of the umbilical cord, which keeps the infants calm. In turn, this makes it easier for the babies to receive treatment.

Hospitals who have received donations from The Octo Project have reported that the premature babies are healthier and happier.

For more information, visit [The Octo Project](#). You don't need permission to start your own group, but as is stated on the Danish site, they like to coordinate international efforts if at all possible. The pattern is free to download, so anybody can get started right away.

## More Strange Laws

We've shared weird Canadian laws before, and this batch of legislation is no different. Many of these laws have since been repealed, but at one time they were in full effect.

**Toronto is sick of garage sales.** According to the municipal code, homeowners can hold a maximum of two garage sales per year. Going over the limit can result in a fine of \$5000.

**We're serious about maple syrup.** The Maple Product Regulations prevent the import, export, and interprovincial trade of products that might be mistaken for maple.

**Don't frighten the Queen.** If you intentionally scare or try to alarm the Queen, you could face up to 14 years in prison, making this infraction a serious felony.

**No dueling bagpipes in BC.** Street performers in Victoria need to be careful. A bagpiper is not allowed to perform at the same time as another act that includes bagpipes.

**Choose your colours carefully.** In Kanata, a garage door may be painted any colour except for purple. Opting for a grape door can result in a fine.

**Housing colour rules aren't limited to one province.** In Quebec, houses can be painted at most two colours at once.

**Cows can't be pets in NL.** It isn't illegal to own a cow, but you aren't allowed to keep it inside your home as a pet. You can, however, drive cattle through the streets of St. John's, but only after 8 pm.

**Wood is important in AB.** If your ladder is made of wood, it can't be painted in Alberta. Also, you aren't allowed to set someone's wooden leg on fire (although this one should be obvious).

**Defacing a penny is still a problem.** Even though the penny is no longer in circulation, citizens are not allowed to deface the currency.

Although they seem absurd now, the majority of the strange laws we see were put into place to deal with an issue that members of the community felt needed to be addressed on a large scale.



Did you know...?

The website [www.picturethisclothing.com](http://www.picturethisclothing.com) allows users to upload pictures of their kids' drawings, and turns them into real clothes. Users print out a colouring template, upload an image of the coloured page, and the company creates a dress or T-shirt using the design. Prices start at \$49 USD.

*Please feel free to share this newsletter with others.*

*If you have any questions, comments, would like to suggest a topic, or to **unsubscribe**, please email us at [chelsea@butlerwillsandestates.com](mailto:chelsea@butlerwillsandestates.com)*