Reprinted by
CARTER & ASSOCIATES March 9th, 1994

CHURCH & THE LAW UPDATE-No 1

By Terrance S. Carter, B.A., LL.B.

Updating Churches on recent legal developments and risk management considerations.

1. INTRODUCTION

This is the first issue of Church & the Law Update. It is intended to provide an update for churches and charities on current legal developments as well as providing recommendations on matters of risk management where appropriate. The Church & the LawUpdate is being distributed free of charge as a service to churches and charities and is published approximately three to four times a year as legal developments occur.

2. CHURCH & THE LAW SEMINAR - 1994

The need for a periodic update on legal issues for Churches arose out of the interest shown in the first annual Church & the Law Seminar held at Queensway Cathedral in Etobicoke on January 11th, 1994. More than 570 Ministers and Church Leaders attended, the vast majority of whom wanted to receive a periodic Church & the Law Update.

The topics that were presented at the 1994 Church & The Law Seminar included the following:

(i) Overview of Legal Trends Affecting Churches;
(ii) Legal Aspects of Church Discipline;
(iii) The Church and the Ontario Human Rights Code;
(iv) Topical Tax Issues Affecting the Church;
(v) Should a Church Incorporate?;
(vi) Reporting Sexual & Physical Abuse of Children;
(vii) The Church and the Court
- Civil Practice and Sexual Abuse;
(viii) Topical and Tax Issues Affecting Clergy; and
(ix) Remuneration of Ministers and Church Boards.

For those who would like to obtain audio tapes of any of the topics discussed at the 1994 Church & The Law Seminar together with an accompanying one page handout summary, tapes can be ordered by contacting the Canadian Council of Christian Charities at (519) 669-5137.

3. CHURCH & THE LAW SEMINAR - 1995

For those Ministers and Church Leaders who would like to plan ahead to attend the Church & the Law Seminar in 1995, a tentative date has been established for February 8th, 1995, to be held at Queensway Cathedral in Etobicoke, Ontario. More details of the seminar will be provided in the
Fall of this year.

4. POWERS OF ATTORNEY AND THE SUBSTITUTE DECISIONS ACT, BILL 108

A significant amount of confusion has arisen concerning the new Substitute Decisions Act, Bill 108, which was passed in the Ontario Legislature in December of 1992 and will come into effect (i.e. be proclaimed) in early 1995. The confusion has arisen because of erroneous newspaper articles that have been circulated by various groups. In addition, there are brochures that are being distributed in communities and churches which allege that the Ontario Government is attempting to take control of an individual's affairs away from the family in the event of mental or physical incapacity. Erroneous statements have also been made that unless a power of attorney is signed before the new legislation

comes into effect, individuals will lose the opportunity to appoint an individual to be their attorney in the future. In other words, the incorrect information being circulated suggests that to have the ability to appoint an attorney, you must sign a power of attorney before early 1995, otherwise your ability to sign a power of attorney will be lost.

As a result of these incorrect statements, an atmosphere of panic, especially among elderly people and some church members, has been created, particularly for those who are understandably suspicious of government interference. This state of panic has resulted in individuals feeling that they must immediately sign a power of attorney and are therefore resorting to pressure from individuals who are attempting to sell "power of attorney kits".

Even though the Province of Ontario has attempted to correct the misunderstanding concerning the new legislation, the suspicion and panic has continued. This is unfortunate, since the new legislation is an improvement over the current law and is more supportive of family involvement for individuals who are incapacitated than is currently the law in Ontario.

What follows is a brief explanation of why it is important to have a power of attorney, but with an explanation of why there is no need to fear the Substitute Decisions Act in relation to signing a power of attorney either now or in the future.

A. Do I need a Power of Attorney?

It is a good idea for every adult over the age of 18 to have a power of attorney, because it permits another trusted individual, such as a spouse, to manage your affairs on your behalf if you become incapacitated either mentally or physically. The reference to a continuing (often called a "durable") power of attorney means that the power of attorney will remain in effect after your becoming incapacitated for any reason. Most powers of attorney prepared by lawyers in the last ten years provide that they continue in effect after an incapacity. They constitute a continuing or durable power of attorney under the new legislation.

B. Is there any need to panic?

THERE IS NO REASON TO PANIC. Currently, you can make a power of attorney without any restrictions. Misleading information that is being distributed to the public and churches suggests that the right to make a power of attorney will expire once the new Substitute Decisions Act comes into effect, sometime in 1995. This is untrue. Since you will still be able to make a power of attorney under the new legislation and since all powers of attorneys, no matter when signed, will be subject to the new legislation, there is no reason to feel under any pressure or sense of panic to have to make a power of attorney before the deadline or the implementation of the new Act in early 1995.

Anyone who does not have a power of attorney, should consider obtaining one. However, the decision should be made after careful consideration and not out of a sense of panic.

C. What about a Power of Attorney for my personal care?

Under the current law, you cannot appoint an attorney to make health care decisions for you. Under the new Act you will be able to sign a power of attorney for personal care that allows another person, such as a spouse, to make health care decisions if you become incapable. It can be revoked at any time and only takes effect if you are incapable of deciding for yourself. The ability to appoint an attorney for personal care is a distinct advantage of the new legislation.

D. Do I need to update an existing Power of Attorney?

It is probably a good idea to update an existing power of attorney to take advantage of the greater flexibility under the new Act. The form provided under the existing Powers of Attorney Act is a very basic one. You might wish to consider having clauses added to it or to the new form to be provided under the Substitute Decisions Act, to provide for, among other things: (1) an alternate attorney or attorneys if the one you appoint is not able or willing to act; (2) to delay the delivery of the power of attorney so that it will only come into effect if you become incompetent; (3) to provide for the appointment of a substitute attorney for a temporary period, if your attorney is absent for a period of time; (4) to provide for remuneration for your attorney in proper circumstances; and (5) and to protect your attorney for losses incurred if he or she acted in good faith.

However, if you have an existing power of attorney dealing with your property, the new legislation specifically states that it will remain in full force and effect after the new Act is proclaimed into force. If you sign a Power of Attorney for Personal Care now in anticipation of the new Act being proclaimed into effect, the legislation states that a Power of Attorney for Personal Care will be deemed to be effective as of the date of proclamation.

If you decide not to update your power of attorney prior to the implementation of the new Act, there is nothing stopping you from doing so after the new Act is in effect. As a result, there is no need to panic concerning preparing a new power of attorney now, as an existing power of attorney will remain in effect after the new Act comes into force and you will still have the ability to update your existing power of attorney at any time in the future.

E. What happens if I don't have a Power of Attorney?

If you do not have a power of attorney and you become incapable of managing your own affairs, then under the current law before a spouse, relative or friend can take over the management of your affairs, an application has to be made to a court under the Mental Incompetency Act to appoint that individual as a committee (i.e. court appointed equivalent of an attorney). It is an expensive and lengthy court procedure and requires that the committee return to court every two to three years to provide an accounting to the court concerning how the property and monies of the incompetent person have been managed.
Under the existing law, if a spouse, family member or friend does not make application to become a committee of an incapable person, the Public Trustee of Ontario, out of necessity, takes over the business affairs of the individual. This is done as a last resort.

Under the new Substitute Decisions Act, a spouse or family member can still apply to take over the management of the affairs of a person who has become incapable. Initially, the Public Trustee (which position will be expanded into a larger office to be known as the Public Guardian and Trustee) takes over the affairs of an incapable person. However, a spouse or family member can apply to the Public Guardian and Trustee to take over as the person's statutory guardian of property. The advantage of the new law is that instead of having to make an expensive application to the court to obtain an order to take over the affairs of an incapable person, it will be possible for a spouse or family members to do so by a summary application to the Public Guardian and Trustee. This will save the family a great deal of legal cost and will expedite establishing legal authority over the property of an incapable person who never signed a power of attorney.

Under the new law, if the property of an individual is less than $50,000.00, no security will usually be required. If the property is valued in excess of $50,000.00, the family member applying to be the statutory guardian of the property will normally have to place security to ensure performance of his or her duties. That is no different from the current law and therefore will not create any more onerous obligations upon family members. In addition, it is possible to obtain an order to reduce the amount of security where circumstance necessitate.

F. If I have a Power of Attorney will my family be required to place security or file a management plan?

Under both the existing law and the new Substitute Decisions Act, if a person has made a power of attorney, either now or in the future, and subsequently becomes incapable, the person that has been appointed as the attorney will be able to take over the affairs of that person without having to file any security or a management plan. As a result, there is absolutely no change in the law concerning how a power of attorney is implemented.

G. What is the difference between a Power of Attorney and a Living Will?

A living will is a directive to someone providing health care to you stating what medical treatments will or will not be acceptable to you in the event that you become incapacitated. Under new legislation entitled Bill 109, Consent to Treatment Act, a health care provider must follow the wishes of his or her patient. Those wishes can be expressed in a living will, in a power of attorney for personal care, in any written document, or even orally.

It is probably a good idea when making a power of attorney for personal care to include a provision expressing your wishes about medical treatment in the event of any incapacity. It is not necessary to do so, but is an option available to you under the new legislation.

H. Is the new legislation an attack on the family?

Absolutely not. If anything, the new Substitute Decisions Act creates statutory obligations upon an attorney to respect the input of the family and the values of the person who is incapable, whereas under the present legislation there are no such obligations. For instance, both an attorney under a power of attorney and a guardian appointed where there is no power of attorney, is required under the new legislation to;

1. foster regular personal contact between the incapacitated person and supportive family members and friends,

2. consult from time to time with supportive family members and friends,

3. make expenditures that are reasonably necessary for the support, education and care of the incapable persons' dependents,

4. consider making expenditures of gifts or loans to the incapable persons' friends and relatives, as well as charitable gifts, where the power of attorney provides for making charitable gifts or where there is evidence that the incapable person made similar expenditures when he or she was capable, and

5. take into consideration the values and beliefs that the person held when he or she was capable and believes that the person would still act on if capable.

I. WHAT SHOULD I DO?

Although there has been much misinformation circulated about the Substitute Decisions Act, at least the public is now looking at the issue of powers of attorney for the first time. This is clearly a beneficial byproduct of an unfortunate and unnecessary state of confusion.

When considering obtaining a power of attorney, the following are some practicable considerations to keep in mind:

1. Don't panic. The new legislation when implemented will not restrict you in any way in signing a power of attorney. As such, there is no need to rush into signing a power of attorney now.

2. If you have an existing power of attorney, it is probably a good idea to consider updating it to obtain the enhanced flexibility that is provided for under the new legislation concerning powers of attorney of property and powers of attorney for personal care.

3. The decision to make a power of attorney should be made after careful consideration. For instance, you should consider appointing an alternative attorney in the event that your first choice, such as your spouse, is not able to act on your behalf.

4. Although powers of attorney forms are, or will soon be available free of charge from the government, or can be acquired as kits from various sources that do not require the involvement of a lawyer, it is worthwhile to check with your family lawyer about having him or her prepare the power of attorney on your behalf. The advantages in doing is are the following:

   (i) You will normally find that the cost of having your lawyer prepare the power of attorney is no more than the cost of acquiring a power of attorney from a kit that does not otherwise entitle you to the benefit of advice and services from your lawyer.

   (ii) Your lawyer will be able to modify the power of attorney to reflect your specific wishes and to include extra provisions, such as providing gifts to churches and charities, for example.

   (iii) Your lawyer will be able to knowledgably answer any questions that you have about powers of attorney and how they are implemented.

   (iv) Your lawyer will be able to ensure that the power of attorney is properly executed and witnessed and will be able to give evidence of your capacity at the time that it was signed if it is ever called into question.

   (v) Your lawyer will normally retain some copies of the powers of attorney in his or her file for safe keeping at no additional charge.

   (vi) If you instruct your lawyer, he or she can control the release of a power of attorney to family members or friends if you do not want the power of attorney to come into effect until some later time, such as in the event of an incapacity.

5. If you are approached to become involved in a business proposition to distribute power of attorney forms or hold seminars to sell them, you should first contact the Law Society of Upper Canada to determine whether such business venture is permissable or whether it constitutes an unauthorized giving of legal advice.

J. CONCLUSION

While it is unfortunate that so much confusion has arisen surrounding the new Substitute Decisions Act, it is probably a good thing that the public is now looking at the issue of powers of attorneys seriously for the first time. A Power of Attorney is an important legal document and should only be prepared after careful consideration. For those individuals that do want a power of attorney, hopefully this article has clarified that the new Substitute Decisions Act will not in any way impede their ability to do so, whether now or in the future.

Reprinted by

CARTER & ASSOCIATES
BARRISTERS, SOLICITORS & TRADE-MARK AGENTS
*211 Bro*adway, P.O. Box 440
Orangeville, Ontario, L9W 1K4
Telephone: (519) 942-0001
Fax: (519) 942-0300
E-Mail: tcarter@carterslawfirm.com
Web: www.carterslawfirm.com
www.charitylaw.ca