

Planning your Will and Powers of Attorney

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DISCLAIMER

This presentation does not constitute legal advice or a legal opinion on any matter discussed. Our participation in this presentation does not create a solicitor-client relationship.

This presentation is for educational purposes only. If you have a specific legal question, please consult with a lawyer of your own choice.



Making a Will

Why have a will?

- ▶ Direct how your belongings will be distributed.
 - ▶ Appoint a guardian for your children or dependants.
 - ▶ Leave instructions for your funeral/end of life ceremony.
 - ▶ Appoint an executor of your estate.
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- ▶ A will makes administering your estate easier for the administrator – who will likely be your spouse or a close friend or family member.
 - ▶ It can reduce delays and confusion, reduce INAC's involvement, and calm disputes between family

What happens if I don't make a will?

- ▶ You will be deemed to have died “Intestate”
- ▶ Someone will still have to administer your estate
- ▶ The distribution of your estate will be determined by statute. (*Indian Act, Family Homes on Reserves and Matrimonial Interests Act*)
- ▶ The distribution that will be required under these laws may not be in keeping with your final wishes.
- ▶ Example 1: your spouse may have to share your estate with the children of the deceased.
- ▶ Example 2: if you die intestate, your land will not be distributed to next-of-kin who are more remove than a brother or sister. Therefore if you want your land to be passed to a niece, nephew, or cousin, you should make a will.

What happens if I don't make a will?

- ▶ Example 3: assets may have to be sold and divided evenly amongst all family members – which may not be your wishes.

Grandmother lives alone in her own trailer on reserve lands. She has a large family that are entitled to part of her estate. Only one member of her family wants to live in the trailer when she died, but not everyone can agree that this family member should be given the trailer. Because not everyone can agree, the trailer is sold and the proceeds are divided equally amongst the descendants. The trailer was not worth very much money, so the share given to each family member was insignificant. If the grandmother had a will, she could have given the trailer to a family member who she wanted to live in it.

Will the Indian Act apply to me and my will?

- ▶ If you have Indian Status AND live on reserve (are an ordinary resident) the *Indian Act* will apply to your estate.
- ▶ Includes:
 - ▶ People who live on reserve ordinarily but are away for school or seasonal work;
 - ▶ People whose home is on reserve but who leave to stay in a care facility.

How does the Indian Act affect me and my estate?

- ▶ Aboriginal Affairs and Northern Development Canada (AANDC) confirms/appoints executor
- ▶ Approves the will
- ▶ Administers the estate if no one else is able to do so.
- ▶ Transfers lands on reserve from the estate to heirs/beneficiaries



Making a Will – The basics

Handwritten (Holograph) Wills?

Section 15 – Indian Estates Regulations, C.R.C., c.954

Will

15 *Any written instrument signed by an Indian may be accepted as a will by the Minister whether or not it conforms with the requirements of the laws of general application in force in any province at the time of the death of the Indian.*

Section 6 – Succession Law Reform Act, R.S.O. 1990, c. S.26

Holograph wills

6 A testator may make a valid will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation or signature of a witness. R.S.O. 1990, c. S.26, s. 6.

What is needed to make a will?

- ▶ In writing
- ▶ Signed and dated by you
- ▶ Expressing your wishes upon your death, including what you want done with at least one of your possessions.
- ▶ State that it takes effect after your death.
- ▶ If you have Indian Status and live on reserve, your will ONLY has legal force once it is approved by AANDC or a court has granted probate.

What else should be in my will?

- ▶ Witnessed by two adults who are NOT beneficiaries or your spouse
- ▶ Name an executor (someone you want to administer your estate)
- ▶ Names and contact information of your beneficiaries – so that the administrator can contact them when you die.
- ▶ A list of your assets and where they are located:
 - ▶ Bank accounts, investments, insurance policies
 - ▶ Land, commercial licences, vehicles, buildings, etc.
- ▶ A list of debts, how much they are worth, and who holds them:
 - ▶ Credit cards, line of credit, mortgage, utility bills, income tax liability, funeral expenses, loan payments, etc.
- ▶ Who should look after your children/dependants.

What else should be in my will?

- ▶ Your wishes regarding who should inherit each of your assets, such as your home, vehicles, money.
- ▶ Other items that you would like to go to specific people. For example, sentimental items or special items such as jewelry, artwork, furniture, etc



Important to consider
what will pass through
your estate and what
transfers automatically

Assets and Belongings

- ▶ Some assets are automatically part of your estate, for example, things that belong only to you, such as money, vehicles, jewelry.
- ▶ Some assets will not be part of your estate. For example, insurance policies or pensions **where you have named a beneficiary**.
- ▶ **Jointly held property** also does not form part of the estate. For example, jointly held bank accounts or jointly held property. These automatically go to the other joint holder.

Assets of the Estate

INCLUDED

- Real property (land) – that is not held jointly
- Cars
- Bank accounts/money
- Investments
- Personal items, such as jewelry
- Anything you don't specifically provide for individually in your will, such as smaller possessions, is called the "Residue"

EXCLUDED

- Insurance proceeds with a named beneficiary
- Pensions with a named beneficiary
- Bank-owned houses
- Jointly held property (such as a joint bank account, jointly owned home or land)



What about the Indian
reserve lands that I
occupy?

VERY IMPORTANT TO BE MINDFUL OF THIS

Land on Reserve

- ▶ Generally, band owned land cannot be given away in a will. However, you should include your desire for how your home is to be treated in your Will, so that the executor and the Band know your wishes.
- ▶ Any lands you may hold off-reserve should be provided for in your will. Alternatively, you can estate plan and include the person who is to inherit the land on title as a joint tenant.

Limitations to Passing on Land

- ▶ Spousal Interests? If your spouse does not have Indian status, or is not a member of your Band, they do not have an automatic right to stay in the home forever once you pass away. They will be affected by the *Family Homes on Reserve and Matrimonial Interests or Rights Act*.
 - ▶ *Surviving spouses and common law partners have 180 days following the death of their spouse or common-law partner. Within ten months they must apply to the court to claim survivor rights and interests to the family home under the Act.*
- ▶ **Distribution among next-of-kin**
- ▶ **48 (8)** Where an estate goes to the next-of-kin, it shall be distributed equally among the next-of-kin of equal degree of consanguinity to the intestate and those who legally represent them, but in no case shall representation be admitted after brothers' and sisters' children, and any interest in land in a reserve shall vest in Her Majesty for the benefit of the band if the nearest of kin of the intestate is more remote than a brother or sister.

Limitation to Passing on Land Cont'd

- ▶ Devisee's entitlement
- ▶ 49. A person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be deemed not to be in lawful possession or occupation of those lands until the possession is approved by the Minister. R.S., c. I-6, s. 49.
- ▶ Non-resident of reserve
- ▶ 50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.



Other Considerations when making your will

Other Considerations when making your will

- ▶ Do you have customarily adopted children? If so you should name them specifically in your will rather than saying “my children”.
- ▶ Do you have a blended family (ex, biological children and step-children), how do you want your assets to be divided if you pass?
- ▶ What do you want to happen in the instance that someone named in your will dies before you do?
- ▶ Who will care for your children if you and your spouse die at the same time?
- ▶ Are children and dependant adults properly accounted for in your will?

Other considerations in making a will

- ▶ Do you own or operate a business? What will happen to the business when you die?
- ▶ Will you and your spouse be making wills together?

Will my Marriage affect my will?

- ▶ Getting married or remarried will not automatically cancel your will, if your will is governed by the *Indian Act*.
- ▶ In Ontario though, a marriage automatically revokes a Will.

Choosing an executor (or more than one!)

- ▶ Being an executor is a large responsibility. Your chosen executor should be:
 - ▶ Capable of managing the paperwork involved and understanding their responsibilities
 - ▶ Able to communicate with your family and beneficiaries
 - ▶ Trustworthy
- ▶ Executor must accept appointment (talk to them beforehand!) You may want to choose an alternate as well.

Role of the Executor

- ▶ protect the estate's assets
- ▶ inform heirs, creditors and beneficiaries of your passing
- ▶ pay the debts of the estate
- ▶ distribute your assets according to the will (if no will, then according to the *Indian Act*)
- ▶ pay any taxes owing by the estate
- ▶ Provide a report for heirs/beneficiaries of what has been done with the estate.

Estates of Dependant Adults and Minors

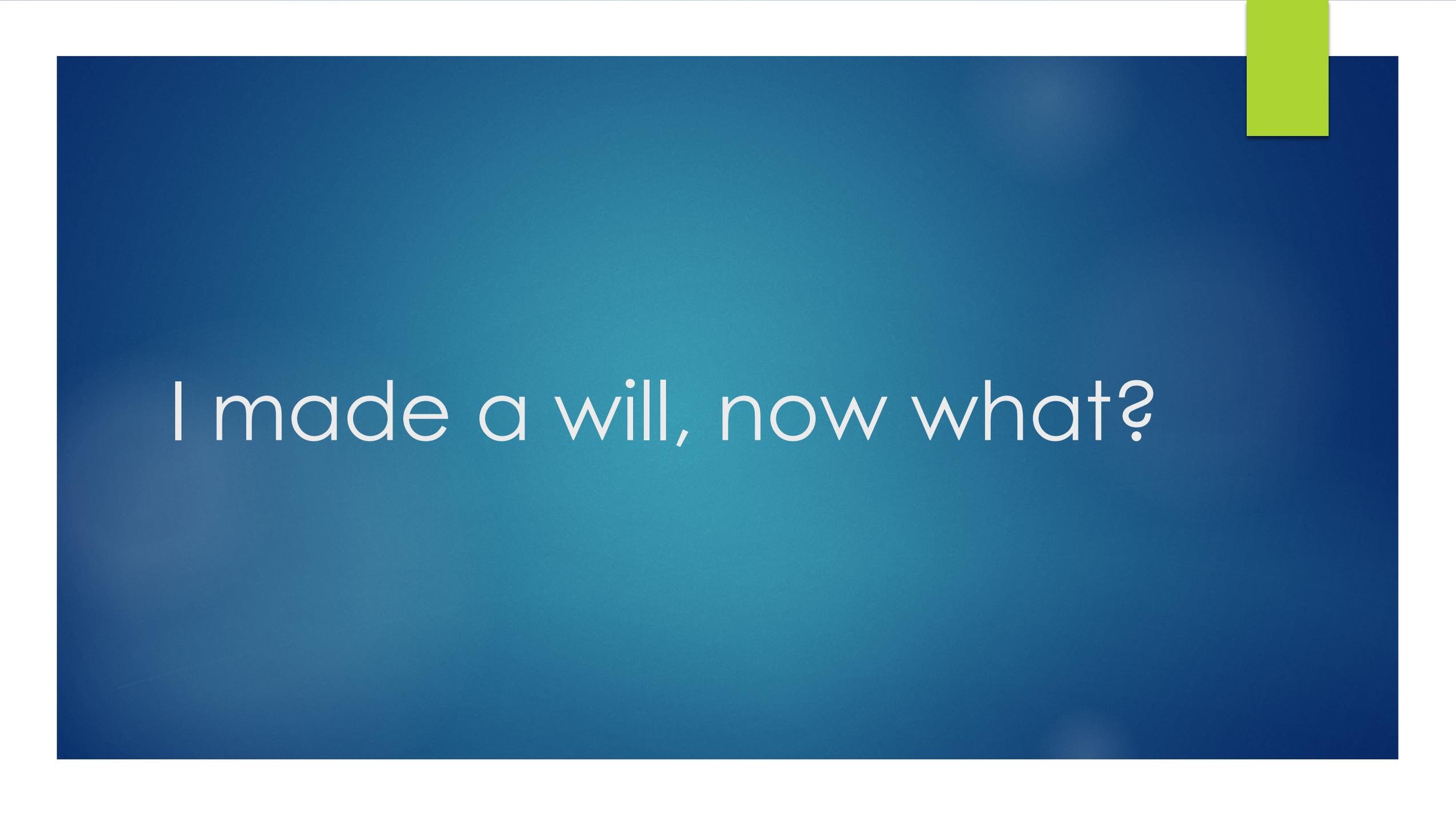
- ▶ **Dependant adult:** Someone without capacity, for ex. Dementia. Who has been diagnosed as not having capacity by a doctor/certified health professional, or capacity assessor.
- ▶ INAC is required to manage the estates of Indians who cannot manage their own affairs. Usually a family member takes the leading role and INAC can assist them with the administration. This means they will deal with money, property, etc. Personal Care decisions are the responsibility of the province or territory where they reside.
- ▶ **Minor: under 18:** Usually a child's parent or guardian will look after a child's estate. In rare circumstances INAC will get involved, and can assist parents or administer the estate.

Do I need a lawyer to make my will?

- ▶ You do not NEED a lawyer to write your will, but you should seriously consider retaining one to prepare it for you.
- ▶ Consult a lawyer if:
 - ▶ You have children, or care for a dependant adult, such as someone with special needs.
 - ▶ You have assets of significant value
 - ▶ You own property
 - ▶ You own a business
 - ▶ You have family members who are not Band members, or who do not have Indian Status.
 - ▶ You are married and are making mutual wills with your spouse
 - ▶ You get or are divorced

Make sure your will is not going to be voided!

- ▶ The Minister may void all or part of a will on one of the following bases:
 - ▶ Duress or undue influence
 - ▶ Lack of testamentary capacity
 - ▶ Terms of the Will create undue hardship for dependants
 - ▶ Disposes of reserve lands contrary to the interests of the Band or contrary to the Indian Act.
 - ▶ Terms are vague or uncertain
 - ▶ Terms of the Will are against the public interest
- ▶ Having a lawyer help will help prevent this.



I made a will, now what?

Keep it somewhere safe, NOT secret

- ▶ Your original will is needed to settle your estate- INAC will require it.
- ▶ Keep your will somewhere safe, and **tell your executor** or someone else you trust where you keep your will, so that they know where to look when you die.
 - ▶ Safety deposit box
 - ▶ Fire proof safe
 - ▶ Lawyers office
 - ▶ With trusted friend or family member

Update your will!

- ▶ You can change your will as often as you like. However you should update it when:
 - ▶ You have a child, or children
 - ▶ **Get married, divorced, or enter a common-law relationship**
 - ▶ **Remember to change the designations on any insurance policies or pensions!**
 - ▶ move or buy property
 - ▶ Someone in your will dies (ex a beneficiary or your named executor)
 - ▶ Acquire new valuable assets.
 - ▶ Changes should be dated, initialed and witnessed.

What happens when I die?

- ▶ The executor or family will have to contact ANNDK/INAC
- ▶ Family/Executor will have to find your will (if you have made one!)
- ▶ If there is a will, they will have to get the Minister to approve it.
- ▶ If the will names an executor, then that person will be appointed by the Minister. They will then carry out with administering the estate.
- ▶ If there is no will, or the Minister does not approve the will, or if the will is successfully challenged, then the estate will be administered in accordance with the rules in the *Indian Act* and *Family Home and Matrimonial Interests or Rights Act*.

Smarter and Stronger Justice Act

- ▶ If not ordinary resident on reserve before death, your estate trustee can apply to the court to become estate trustee with or without a will
- ▶ However, take note, there was new legislation passed for small estates of \$150,000.00 and less
 - ▶ Takes effect April 1, 2021
 - ▶ Dispensing with bonds
 - ▶ Simpler forms
 - ▶ Less documents will be required for filing
- ▶ Estate tax will still be due on any and all estates over \$50,000.00

Estate Tax

- *You do not need to pay Estate Administration Tax if the value of the estate is \$50,000 or less. However, you must still file an Estate Information Return within 180 calendar days after the estate certificate has been issued.*
- *For estates valued over \$50,000, the Estate Administration Tax will be calculated as \$15 for every \$1,000 (or part thereof) of the value of the estate.*

For more info visit: <https://www.ontario.ca/page/estate-administration-tax>



Power of Attorney

Two kinds of “Power of Attorney”

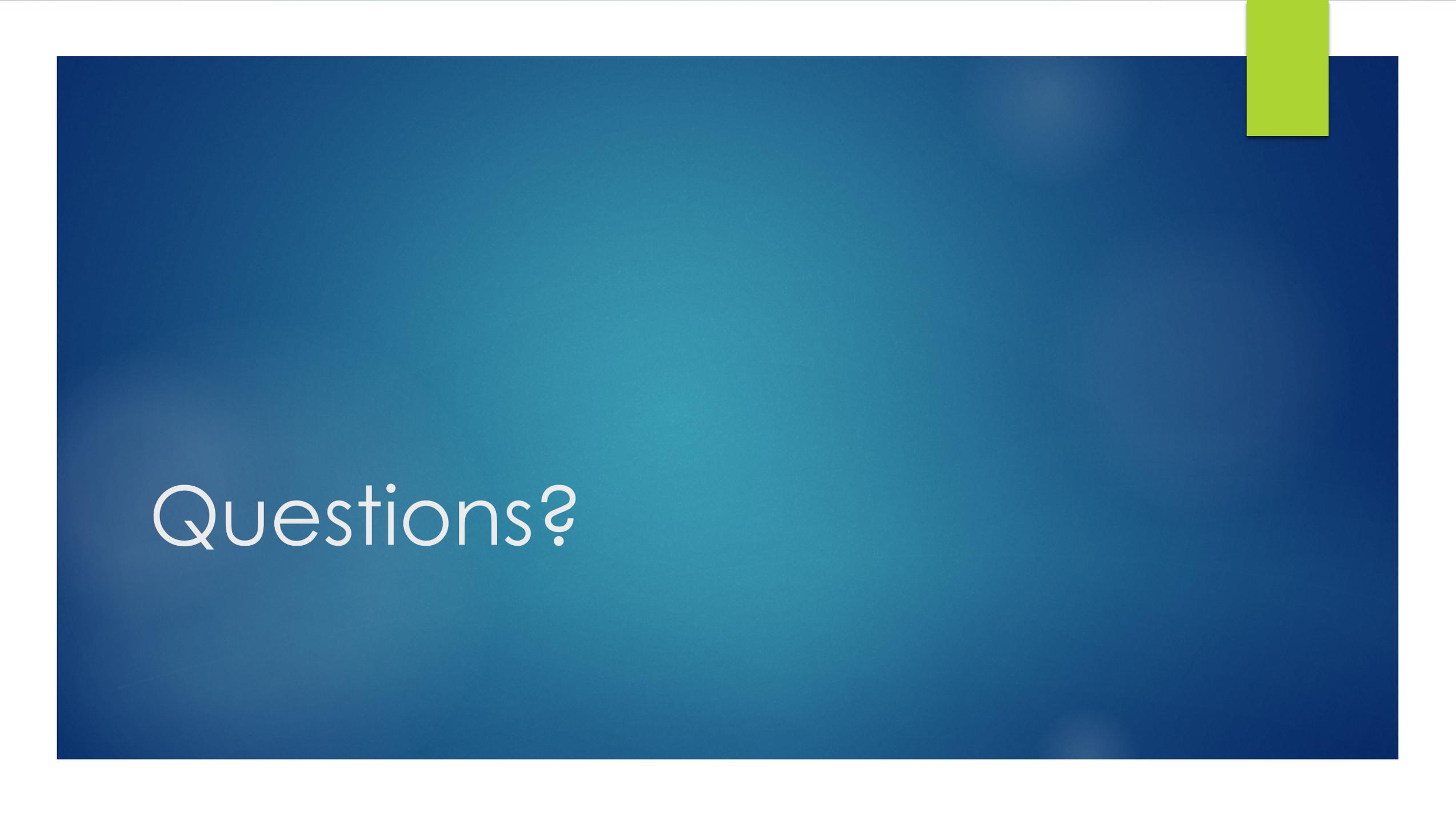
- ▶ A Power of Attorney is a written authorization for someone to represent or act on your behalf in private affairs, business, or other legal matters while you are alive, but incapable of making these decisions.
- ▶ 1. Power of Attorney for Property
- ▶ 2. Power of Attorney for Personal Care

Power of Attorney for Property

- ▶ Appoint someone to make decisions concerning your property and finances.
- ▶ Can come into effect once you lose capacity – but also can be specified for certain time periods.
- ▶ Can be changed or revoked, as long as you have capacity to do so.
- ▶ Can specify what your attorney has the power to do, and what powers they are restricted from exercising.
 - ▶ For example, you could allow them to manage your day to day finances and investments, but not to dispose of certain property.

Power of Attorney for Personal Care

- ▶ Appoint someone to make personal healthcare decisions on your behalf, when you are no longer able to do so.
- ▶ You can set out your personal care wishes for when you no longer have capacity.
- ▶ Comes into effect ONLY once you have lost capacity to make decisions on your own.
- ▶ Can be changed or revoked, as long as you have the capacity to do so.



Questions?