



Decisions, Decisions: The Role of the Substitute Decision- Maker in Health Care Related Decision-Making

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Disclaimer

I am not a lawyer and this is not intended to constitute legal advice.



Powers of Attorney in Ontario

- There are two main types of Power of Attorney in Ontario
 - Power of Attorney for Personal Care
 - Continuing Power of Attorney for Property

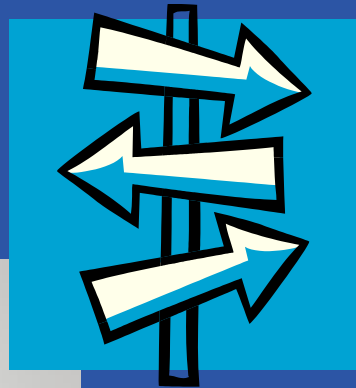


What is a Power of Attorney?

- A Power of Attorney is a legal document, **i.e. a piece of paper**, that someone uses to appoint another person to act on their behalf for
 - Personal care decisions
 - “Property” (financial) decisions
- A substitute decision maker (SDM) may make decisions for you, if you become mentally incapable of making them yourself



POWER OF ATTORNEY FOR PERSONAL CARE



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What are Personal Care Decisions?

- Personal care decisions relate to:
 - Health care & medical treatment
 - Diet
 - Housing
 - Clothing
 - Hygiene
 - Safety





Does a Resident Need to Have a Formal Power of Attorney for Personal Care?

- No...
but there are advantages to formalizing this (i.e. putting it in writing)





If A Resident Doesn't Have a Formal Power of Attorney Who Makes Their Personal Care Decisions?

- The resident/patient should always be approached first to make their own personal care decisions
- If they are found to be “incapable” of a particular decision, and DON'T have an Attorney for Personal Care appointed, the care provider will turn to the appropriate person according to the hierarchy found in the Health Care Consent Act



Can A Resident Appoint More Than One Person?

- Yes – they can appoint as many people as they want
- They can also appoint a “back up” decision maker if the primary decision maker can’t be reached or is no longer able to act for them





List of Substitute Decision-Makers (Health Care Consent Act, s.20)

1. Guardian of the person (*appointed by the courts*)
2. Attorney for personal care (*document*)
3. Personal representative (*appointed by the CCB*)
4. Spouse or partner*
5. Child or parent or Children's Aid Society*
6. Access parent*
7. Brother or sister*
8. Any other relative*
9. Public Guardian and Trustee (SDM of last resort)


* not necessarily a formally appointed Attorney for Personal Care, but may still be the appropriate substitute decision maker





Criteria for Being a Substitute Decision-Maker

1. Willing
2. Available
3. 16 years of age (unless a parent < 16 is making a decision for his/her child)
4. Not prohibited by court order or separation agreement
5. Must be capable themselves, with respect to the proposed treatment / decision



Advantages to Appointing an Attorney for Personal Care

- ✓ You get to choose someone that you trust to make your personal care decisions when you no longer can
- ✓ It is a way to help your decision maker know what you want for your personal care when you are no longer able to participate in the decision making
 - eg. if you do not want certain medical treatments if you become seriously ill, you can write this in your Power of Attorney



When does a Power of Attorney for Personal Care Take Effect?

- It only take effect if the resident becomes or is determined to be “incapable” of making some / all of their personal care decisions



Who Decides if the Resident is Capable?

- It depends on the type of decision required
 - Healthcare treatment, admission to a long term care facility and personal assistance decisions (eg. bathing, eating while in a long term care facility) all require a health care professional or related person to determine whether the patient is capable to make that decision



Capacity

- Capacity can fluctuate
 - a person may be capable to some things and not to others
 - a person may be capable today and not tomorrow
 - a person may be capable in the morning and not in the evening
- There is no such thing as “blanket incapacity” unless someone is unconscious



.... And still more about Capacity

- An individual is presumed to be capable until they demonstrate to us otherwise
- Capacity does not depend on age or diagnosis
 - What if the person has a dementia diagnosis?
 - Dementia does not necessarily make someone incapable
- Capable people are allowed to make decisions with which we don't agree - as long as they are capable of making that decision
- Consent is a process, not a form



What about “social” decisions?

- What is a “social” decision?
 - Nancy’s Kinda-Sorta Made Up Definition:
 - Decisions that have a “personal care flavour” but aren’t classic “care or treatment decisions”
 - Eg. who can visit the resident, what activities they can participate in, who they can call or receive calls from, what activities they participate in, what clothes they want to wear, etc.
- Substitute Decisions Act, 1992
 - The SDM must make an effort to encourage regular personal contact between the incapable person and their supportive family members and friends.
 - The SDM must make an effort to consult with supportive family members and friends of the incapable person, as well as with the incapable person’s care providers
 - The SDM must try to encourage the incapable person’s independence as much as possible.



When does the Power of Attorney for Personal Care end?

1. When the resident dies, or
2. When the Attorney dies, resigns or becomes incapable, or
3. If the resident revokes the appointment while capable, and appoints someone else, or
4. If the courts or the Consent & Capacity Board appoint someone else



CONTINUING POWER OF ATTORNEY FOR PROPERTY



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Power of Attorney for Property

- A Power of Attorney for Property is a legal document (**i.e. a piece of paper**) that gives someone else the power to act on a person's behalf with respect to their "property".
- "Property" includes a person's money, their house, and anything else that they own, including investments, vehicles, jewellery, etc.



What powers does an Attorney for Property have?

- They can act for a person in financial dealings, such as banking, signing cheques, buying or selling real estate and purchasing things
- An attorney for property cannot make decisions about the person's personal care unless they have been appointed for both roles.



When does a Continuing Power of Attorney for Property take effect?

- As soon as it is signed and witnessed, unless the person appointing the Attorney states otherwise
 - eg. you want it to take effect only after you have been found incapable to manage your finances by a Capacity Assessor, you need to specify this
- The only person who can make a determination of incapacity re: property – is a trained capacity assessor



What if someone doesn't have an Attorney for Property & they are found / become incapable?

- Some of their property, such as pension and social benefits might be able to managed informally by friend or family
- Someone could go to court and asked to be appointed as their Guardian of Property
- The Office of the Public Guardian & Trustee could be appointed to manage their property



When does a Continuing Power of Attorney for Property end?

1. When the resident dies (responsibility switches to the Executor of your estate), or
2. When the Attorney dies, resigns or becomes incapable, or
3. If the resident revokes the appointment while capable and appoints someone else, or
4. If the courts appoint someone else