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LEGAL UPDATE

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Editor: Terrance S. Carter

POWERS OF ATTORNEY FOR PERSONAL CARE

Introduction

On April 1, 1994, the Legislative Assembly of the Province of Ontario created a new legal right. It is known as a power of attorney for personal care. You appoint someone, in writing, to make decisions relating to your personal care. These decisions include the right to give or withhold consent to medical treatment under the *Health Care Consent Act, 1996*.

As the idea is a relatively new one, there is little precedent to give guidance as to the content of the Power of Attorney. The *Health Care Consent Act, 1996*, is helpful in some areas, but not in others. It will be many years before legal documents dealing with health care will have the degree of sophistication that is enjoyed by continuing powers of attorney for property. Nevertheless, just because the right is a new one is not a reason to ignore it.

The Need

The need, in simple terms, is that a "health practitioner" is prohibited from administering any treatment until the person he or she wishes to treat has consented to the treatment.

Further, a health practitioner is **forbidden** to administer treatment if he or she believes the person requiring treatment is not mentally capable, until such time as he or she receives consent to administer the treatment from a person authorized to give such consent.

Notwithstanding the above, a health practitioner can give treatment without consent if the person needing treatment is experiencing severe suffering or is at risk.

A "health practitioner" is almost everyone who gives treatment to those needing medical treatment, and includes doctors, nurses and dentists. A full definition can be found in the *Health Care Consent Act, 1996*.

Many people think that because they have signed a Power of Attorney for Property that that attorney can make personal care decisions for them. That is not the case. A continuing Power of Attorney for Property allows your attorney to make decisions regarding property only. It does not include the power to deal with personal care decisions such as medical treatment or education. Powers of Attorney for Personal Care normally deal with the following matters:

1. The appointment of an attorney and the appointment of an alternate attorney if the first

named attorney is unable or unwilling to make a decision or is not readily available to make a decision;

2. The types of decision an attorney is authorized to make;

3. Medical directives with respect to treatment;

4. Provisions with respect to payment of compensation to the attorney for the assumption of responsibility; and

5. Provisions to protect the attorney from decisions that might be unpopular with some members of a family.

Many powers of attorney for personal care deal with only some, and not all of these matters.

Failure to Appoint an Attorney

Under the *Health Care Consent Act, 1996*, if you become mentally incapable, have not appointed anyone to make medical decisions on your behalf, and medical treatment becomes necessary, in the absence of an emergency, your doctor cannot give you any required treatment until he or she finds someone with authority to make decisions for you. If you have not signed a power of attorney for personal care appointing someone to make such decisions for you, consent may be given or refused on a persons behalf by the following:

1. A person appointed guardian of your person by court order, if the order includes a power to give or refuse consent;

2. A person appointed by the Consent and Capacity Board, created under the *Health Care Consent Act, 1996*, to make decisions on your behalf, if the representative has authority to give or refuse consent to treatment;

3. Your spouse, common law spouse, or your partner, who is defined as a person with whom you have lived for at least one year and with whom you have a close personal relationship that is of primary importance in both of your lives;

4. Your children;

5. If you are a minor, your parents;

6. A parent who has only a right of access;

7. Your brothers or sisters; and finally

8. Any other relative.

There are special rules with respect to minors whose parents are separated or where a children's aid society has custody. These are beyond the scope of this Legal Update.

The persons listed cannot give or refuse consent if someone on the list has greater priority, and even then, the person cannot give or refuse consent unless (1) he or she has capacity to understand the problem, the proposed treatment, the risks, and the alternatives; (2) he or she is at least 16 years of age; (3) he or she is not prohibited by court order or separation agreement from giving such consent; (4) he or she is available to give or withhold consent within a time that is reasonable in the circumstances; and (5) he or she is willing to assume the responsibility of giving or refusing consent.

If no one meets these requirements, the Public Guardian and Trustee is appointed by the *Health Care Consent Act, 1996*, to make such decisions.

If children are required to make a decision on behalf of a parent, but disagree as to whether consent to treatment should be given or withheld, and no one has greater priority, the Public

Guardian and Trustee will make the decision in their stead.

Why Make One?

It is obvious from the above that if no one is readily available to make health care decisions if you are not able to make them yourself, or if there is conflict among family members, you should make a power of attorney for personal care to make it clear who you want to make such decisions for you. It does not have to be anyone referred to above, and can be a friend. In addition to medical decisions, your Power of Attorney for Personal Care can make decisions regarding a your health care, nutrition, hygiene, education, training, clothing, recreation and social services.

Later in this Legal Update there is a discussion dealing with medical directives. If you have not discussed the matters referred to in it with your family, a power of attorney for personal care will give guidance to them with respect to your wishes.

It may also be that your wishes are not the same as the wishes of other members of your family. A younger person may not understand the wishes of an older person. It is your wishes that should prevail, not the wishes of someone else.

Most people will appoint their spouse to act as their attorney for personal care, and if their spouse is unable or unwilling, will appoint one or more of their children.

Types of Decisions

Notwithstanding anything contained in the power of attorney for personal care, the *Health Care Consent Act, 1996*, requires your attorney to make health care decisions under that Act in accordance with the following principles:

1. If your attorney knows of your wishes expressed to him or her while you were capable, the decision must be made in accordance with those wishes or instructions.

2. If your attorney does not know your wishes, he or she must act in your best interests.

3. In deciding what are your best interests, under the *Health Care Consent Act, 1996,* your attorney must consider the following:

   a) the values and beliefs your attorney knows you held while you were capable and believes you would act on if still capable;

   b) any wishes you have expressed with respect to treatments that are not required;

   c) whether or not the treatment is likely to:

      (i) improve your condition or well-being,

      (ii) prevent your condition or well-being from declining;

      (iii) reduced the extent to which, or the rate at which, your condition or well-being is likely to deteriorate;

   d) whether your condition or well-being is likely to improve, remain the same, or deteriorate without treatment

   e) whether the benefit you might obtain from the treatment outweighs the risk of harm; and

   f) whether a less restrictive or less intrusive treatment would be as beneficial as the treatment proposed.

The guiding principles for all other decisions that your Power of Attorney for Personal Care is to make are set out in the *Substitutions Decisions*

Act, 1992. Those principles are:

1. If your attorney knows of a wish or instruction expressed while you were capable, the decision shall be made in accordance with the wish or instruction.

2. If the guardian does not know of a wish or instruction then the decision is to be made in your best interests.

3. In deciding what is in your best interest your attorney shall take into consideration:

   a) the values and beliefs they know you held when capable and believe you would still act on if capable;

   b) your current wishes if they can be ascertained; and,

   c) whether the decision is likely to

      (i) improve the quality of your life;

      (ii) prevent the quality of the persons life from deteriorating; or

      (iii) shall reduce the extent to which or the right at which the quality of your life is likely to deteriorate;

      (iv) whether the benefit you expect to obtain from the decision outweighs the risk of harm from an alternative decision.

   d) the attorney is to chose the least restrictive and intrusive course of action that is available and appropriate.

The Power of Attorney is to foster regular contact between an incapable person and supportive family members and friends, also to consult with those people.

Medical Directives

Your Power of Attorney can contain your medical directives. It does not have to. It is simply enough for the document to appoint someone to make these decisions on your behalf. You may verbally advise your attorney what your wishes are in a particular situation. However, given the dynamics of your family, you may prefer to put them in writing.

Many medical directives deal with near death situations only. Many have no medical directives whatever, and leave it to the discretion of the attorney who presumably knows the views of the person making the power of attorney. Whatever directives you wish to insert in your power of attorney for personal care may not be of much value to your doctors. If you are competent, your doctor will probably ask whether or not you wish to be resuscitated in extreme situations.

The question is really whether or not you wish to insert any medical directive in a power of attorney for personal care or wish to leave it in the discretion of your attorney. Those who do usually say that if their condition is such that they are terminally ill and suffering pain, they want pain relieving drugs to be administered in such doses as to relieve as much of the pain as possible. Many people add that if they are going to die in a short period of time in any event, they do not wish to have life support equipment used to prolong their life.

The decision as to whether or not you wish to have a medical directive in a power of attorney for personal care is yours. You should tell the lawyer preparing it for you whether or not you want it to contain any directive or directives, and if you do, what your wishes are.

If you have instructed your lawyer to put a medical directive in a power of attorney for personal care, you can, while competent, change your mind.

This change of mind can be indicated either verbally or in writing. If you have a power of attorney for personal care, it is only common sense to put any change into writing so that if you become incapable, your wishes will be known.

There is one medical directive that you cannot put into a power of attorney for personal care, and that is a binding direction with respect to euthanasia.

Lawyers have little or no training in dealing with medical problems and are not persons who can give advice on medical directives. These are matters you should discuss with your doctor. Your doctor may be able to guide you with respect to the different types of issues and decisions you may have to make. If you should become mentally incompetent a written document expressing your wishes would be invaluable to your family and your doctor.

As indicated above, you can always change your mind with respect to any of these items as long as you are mentally competent.

Compensation

Many people making powers of attorney for personal care dislike the idea of compensating persons to make care decisions on their behalf. Obviously, one spouse making decisions for the other does not expect to receive such compensation, and it is unusual to have children receive compensation in such circumstances. Nevertheless, there may be cases where compensation should be considered. An example is where one of two or more children bears the whole responsibility for a parent's care, and the requirement of care is an onerous one. The reason one child is chosen may be as simple as geographical proximity, but that does not reduce the burden. It is just not fair that one of them should bear the whole burden. Compensation partially makes up for this unfairness.

Obviously, a clause dealing with compensation is irrelevant if the attorney for personal care is the same person as the attorney appointed pursuant to a continuing power of attorney for property.

Protection of Attorney

The document should also contain some protection for the attorney With respect to the decisions he or she may make or fail to make.

One example can illustrate the need. Regulations to the Substitute Decisions Act require an attorney for property to give an accounting for money received and disbursed on behalf of a person who is mentally incapable to the attorney for personal care on request. The attorney for personal care may have confidence in the attorney for property if they are not the same person, and never make the request. It may be that the confidence is misplaced, and the attorney for property either steals it or otherwise deal with it in an improper manner. On the death of the person for whom they were both acting, the loss is discovered. A beneficiary of the estate might sue both of them for the amount he or she failed to receive because of the improper actions. The action against the attorney for personal care would not be that the attorney received any benefit, but rather, that the attorney was negligent in not requesting copies of the accounts from time to time and checking them. Another example might be the situation of an attorney giving or withholding consent to treatment where such attorney has personal knowledge of the wishes of the person who appointed him or her, where the power of attorney contains no medical directive, where a child of the mentally incapable person disagrees with the decision made, and where such child brings a Court application in an attempt to force the attorney to make another decision.

Who Can Be Appointed

Great care and consideration needs to be given to whom you wish to appoint to make these decisions on your behalf. There are few restrictions as to who you can appoint but the *Substitutions Decisions Act, 1992*, does set them out. To exercise a power of decision the person must be at least 16 years old. The attorney cannot be someone who provides health care to the grantor for compensation or provides residential, social, training, advocacy, or support services to the grantor for compensation unless that person is the grantor's spouse, partner or relative. You can appoint more than one person to act as your power of attorney and in doing so they would act jointly unless the power of attorney provides otherwise. The person you appoint however, should be someone that you trust will honour the decisions that you would make and would not necessarily substitute their own for yours.

Conclusion

It should be obvious from the forgoing that most people should appoint someone to make care decisions on their behalf if they become mentally incapable. Like a will, however, it should be reviewed and perhaps reconsidered every few years to ensure that any document signed now continues to reflect the wishes of the person appointing the attorney.

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Ottawa (613) 235-4774
Mississauga (905) 306-2791
Orangeville (519) 942-0001
Toll Free: 1-877-942-0001
www.charitylaw.ca