

Power of Attorney

Powers of attorney and advanced care planning: Wish list

By **Susannah Roth** and **Margaret O'Sullivan**



Susannah Roth



Margaret O'Sullivan

(September 25, 2019, 8:43 AM EDT) -- Statistics show many Canadians are living with disabilities and many will have a long-term disability. Coupled with our aging population, there is a serious need for everyone to have properly planned for incapacity. This series of articles discusses legal issues involving powers of attorney and practical considerations in planning for incapacity using powers of attorney.

Our last article explored the issues of personal care decisions and advance wishes and directives. This eighth article looks at issues of advance wishes and directives for health care decisions in more depth.

Advance wishes in health care treatment

A person's wishes guide their substitute decision maker (SDM) when making health care decisions on their behalf. If one does not express any wishes, one's SDM must act based on what he or she perceives to be one's best interests. Some people prefer that arrangement for various reasons, while others prefer to set out their wishes in order to ensure that decisions are made in accordance with their preferences, values and beliefs.

Written, oral and priority of wishes

Wishes may be expressed in writing, such as in a power of attorney for personal care or in an accompanying letter of wishes, or orally. Later wishes prevail over earlier wishes, even where later oral wishes conflict with earlier written wishes. It is generally advisable that wishes be in writing as various issues may arise if expressed orally. For instance, health care practitioners are generally reluctant to follow later oral wishes that conflict with earlier written wishes. If the health care practitioner has reason to doubt that later oral wishes are one's true wishes, he or she may apply to the Consent and Capacity Board (CCB) for direction. This may result in a delay of treatment and may create a stressful situation for the SDM and family members.

Where there is a possibility that family members may challenge decisions made by a SDM, it is helpful if the SDM can refer to written wishes when responding to any such challenges. If wishes are expressed in writing, it is still important to discuss them with one's SDM, especially if expressed in general terms. Those discussions provide the SDM with greater context when making decisions.

Wishes expressed while capable prevail

A SDM must follow any wishes expressed by a person while capable if it is possible to comply with them and if they are applicable in the circumstances. Wishes are not to be applied mechanically or

literally. A SDM, not health care practitioners, must interpret stated wishes and determine whether they are applicable in the circumstances.

Inapplicable wishes

Wishes that are vague, unclear and lack precision are most often treated as not applicable in the circumstances. These may include wishes expressing general sentiments in contemplation of an uncertain future. In certain situations, wishes may also not be applicable as a result of changes in condition, prognosis and treatment options.

Wishes tend to be applicable in the circumstances where they arise out of deeply held beliefs, such as a Jehovah's Witness wish not to receive a blood transfusion. These wishes are usually concrete and precise.

Wishes dealing with a person's specific medical circumstances, including likely future illnesses and conditions, are usually applicable in the circumstances. These tend to be expressed in medical terms and are useful where the person has knowledge about the likely progression of his or her illness or condition and the types of treatment that may be offered. They are also useful where a person is scheduled to undergo major and risky surgery. These wishes tend to be applicable in the circumstances because the circumstances to which they apply are specific and the patient also has the benefit of medical advice.

Our next article will give examples of decisions made by the court or the Consent and Capacity Board concerning wishes.

This is the eighth article in a series. Read part one: Powers of attorney and advanced care planning: Disability; part two: Powers of attorney and advanced care planning: Property; part three: Powers of attorney and advanced care planning: Revocation and alternatives; part four: Powers of attorney and advanced care planning: Personal care; part five: Powers of attorney and advanced care planning: Substitute decision making; part six: Powers of attorney and advanced care planning: Health care consent; part seven: Powers of attorney and advanced care planning: Wishes and directives.

Susannah Roth is a partner, and Margaret O'Sullivan is the managing partner at O'Sullivan Estate Lawyers.

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