

## Power of Attorney

# Powers of attorney and advanced care planning: Personal care

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



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(August 12, 2019, 10:55 AM EDT) -- Our last three articles reviewed some important issues involving continuing powers of attorney for property. This fourth article in our series provides an overview of important legal issues relating to powers of attorney for personal care.

Unlike a continuing power of attorney for property which may be made effective immediately under the provisions of the Ontario *Substitute Decisions Act, 1992*, (SDA), a power of attorney for personal care only takes effect when you become incapable of making personal care decisions. For that reason, your attorney may use the power of attorney for personal care only when he or she has reasonable grounds to believe that you are incapable of making personal care decisions, and only after your attorney for personal care has explained to you why a personal care decision is necessary, the nature of the decision, and that you have a right to object to such decision.

### Choice of attorney for personal care

To grant a power of attorney for personal care, you must be at least 16 years old and mentally capable. The person(s) you select to be your attorney(s) for personal care must be at least 16 years old and mentally capable. As protection for the grantor, the SDA specifically prohibits a person from acting as an attorney for personal care if that person provides health care or if that person provides residential, social, training or support services to the grantor for compensation (if that person provides such services without compensation, they may be appointed), unless that person is also the grantor's spouse, partner or relative.



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As with a power of attorney for property, you should consider appointing primary attorney(s) for personal care and alternate attorney(s). If you appoint two or more attorneys for personal care to act together, your attorneys must act jointly unless the power of attorney for personal care provides otherwise. In addition, we generally recommend that for practical reasons you consider limiting the number of attorneys acting together to a maximum of three and that you consider the compatibility of your proposed attorneys, including how

they get along and whether their views on personal and health care decisions are similar or different.

In choosing who you would appoint to make personal care decisions for you if you are incapable of making such decisions for yourself, you may consider appointing one or more close family members or friends whose judgment you trust to make your personal decisions.

### Example

Jane is single, lives in Toronto and has three adult children: Alex who lives in Chicago; Bruce who lives in Barrie, Ont.; and Carolyn who lives in Cambridge, Ont. Jane would like to appoint her three children to act jointly as her attorneys for personal care but is concerned that none of them lives in Toronto. She is confident that each of her children will make personal care decisions in her best interests.

Jane may wish to consider appointing her three children to act jointly as her attorneys for personal care. This means that the children must all agree on personal care decisions for Jane. Alternatively, Jane may wish to consider including a majority decision clause in her power of attorney for personal care providing that if there is a disagreement among her children on a matter of her personal care, the decision of the majority governs.

Jane may also wish to provide a power to allow one of her children to make emergency health care decisions for her should such a decision be needed and only one of her children is immediately available to make such a decision.

### **Providing direction for personal care decisions**

You may grant your attorney for personal care wide discretion to make personal care decisions on your behalf, or you may restrict the attorney's discretion by providing instructions in the power of attorney for personal care, in an accompanying letter or other written document, or even verbally. These instructions may specify types of medical treatment or other personal care that you wish to receive or refuse.

If wishes or instructions for care are expressed, whether written or verbal, your attorney for personal care is under a legal obligation to follow them, unless it is "impossible to make the decision in accordance with the wish or instruction" (SDA, s. 66(3)). Instructions for personal care matters, termed an "advance medical directive" or "living will," may be included in, or prepared in conjunction with, the power of attorney for personal care, so that they will have legal effect. The attorney for personal care must take into account these directions in instructing doctors and other medical personnel.

For example, you may not wish to have "heroic" or artificial life-support procedures continued if there is no reasonable chance of your recovery. This may be of particular importance to persons who have been diagnosed with a terminal illness who wish to provide direction for their care in the event they become incapable of making personal care decisions during the course of their illness. However, like many individuals, you may hold strong views regarding the withdrawal of medical treatment which would lead to death and wish to ensure that under no circumstances would any life-support procedures be withdrawn. In both cases, you can ensure your wishes are known and are binding on your attorney for personal care. Wishes and directives are discussed in more depth in future articles.

If no instructions for care are specified, your attorney for personal care must determine if you expressed any wishes while you were still capable, and if so, he or she is obliged to follow such wishes.

### **Duties of an attorney for personal care**

An attorney for personal care is required to act diligently, with honesty and integrity and in good faith. In addition, the SDA provides that an attorney for personal care also has a duty to explain his or her powers and duties to the incapable person; to encourage the person to participate in decisions about his or her personal care; to foster regular personal contact with the incapable person and supportive family members and friends; to consult with those supportive family members and friends; to foster the incapable person's independence; to choose the least restrictive and intrusive course of action that is available and appropriate; and to record decisions made on the person's behalf.

### **Compensation**

Unlike a person acting under a power of attorney for property, a personal care attorney has no statutory entitlement to compensation. Any right to compensation must be provided in the document if it is to be authorized.

## **Revocation**

You may revoke a power of attorney for personal care at any time while you are capable. There are formal requirements for the revocation which must be complied with for it to be legally effective.

This is the fourth 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; and part three: Powers of attorney and advanced care planning: Revocation and alternatives.

Our next article will review the importance of having a substitute decision maker for personal care and what happens if you do not appoint one in a power of attorney.

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