

Assisted Dying**Powers of attorney and advanced care planning:
Assisted dying**By **Susannah Roth** and **Margaret O'Sullivan**

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(October 3, 2019, 8:59 AM EDT) -- Statistics show many Canadians are living with disabilities and many will have a long-term disability. 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 advance wishes and directives. This ninth article in our series looks at issues related to medical assistance in dying.

Assisted dying

In 1993, the Supreme Court of Canada in *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519 was asked to determine whether the law against assisted dying should be struck down on the basis that it infringes certain rights and freedoms under the *Canadian Charter of Rights and Freedoms* and is therefore unconstitutional. In a 5-4 decision, the court upheld the law against assisted dying.



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However, in *Carter v. Canada (Attorney General)* 2015 SCC 5, the SCC reconsidered its decision in *Rodriguez*. In February 2015, the court unanimously declared that the law against assisted dying is invalid to the extent that it prohibits physician-assisted death for a competent adult person who: clearly consents to the termination of life; and has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

The court suspended its declaration of invalidity for 12 months to provide Parliament, the provincial legislatures and the physicians colleges with time to develop a new legislative scheme to deal with assisted dying in the above circumstances.

On June 17, 2016, Parliament enacted Bill C-14, amending the *Criminal Code* to legalize medical assistance in dying (MAiD). Under the legislation, MAiD, which includes both assisted suicide and voluntary euthanasia, is legal if the criteria and procedural safeguards set out in s. 241.2 of the *Criminal Code* are followed by the doctors or nurses involved.

Under s. 241.2(1) of the *Criminal Code*, a person may receive MAiD if he or she:

- is at least 18 years of age and capable of making decisions with respect to his or her health;
- has requested MAiD voluntarily and not as a result of external pressure or undue influence;
- has provided informed consent to receive MAiD, after having been informed of other options to alleviate suffering, including palliative care;

- is eligible for publicly funded health care services in Canada; and
- has a grievous and irremediable medical condition.

Under s. 241.2(2) of the *Criminal Code*, a person has a “grievous and irremediable medical condition” only if:

- they have a serious and incurable illness, disease or disability;
- they are in an advanced state of irreversible decline in capability;
- that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and
- their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

All prerequisites and conditions must be met for a person to qualify for MAiD. No exceptions currently exist in the legislation. Further, there is continuing controversy on the question of who has access to MAiD — the law does not allow consent in advance to MAiD and does not allow MAiD for minors or the mentally ill. The inability to consent in advance is particularly problematic for individuals with degenerative conditions (e.g. Alzheimer’s disease, dementia, ALS, or spinal muscular atrophy) who may not be able to request MAiD when they truly need it.

Currently an attorney for personal care cannot request MAiD for a person or on their behalf. This restriction is likely to be challenged in court in the future and may be removed. In the meantime, one may wish to consider a written wish regarding MAiD, either for or against, if one has strong beliefs and wishes to provide for a possible decision by one’s attorney for personal care should the law change in the future.

Conclusion

If a person becomes incapable of managing his or her property or incapable of making personal care decisions, others will have to make these decisions on behalf of the incapable person. In order to have control over who the decision maker will be and to provide guidance in making such decisions, it is recommended that powers of attorney for property and personal care be prepared as part of estate planning. Important consequences will flow from decisions about who one appoints as an attorney, what powers and duties are given to the attorney, safekeeping of original powers of attorney, and the timing and method of their release.

Unless a power of attorney clearly sets out one’s intentions, one’s wishes may not be fulfilled should subsequent incapacity occur. Without proper planning, decisions about one’s future care may be made without the benefit of knowing one’s wishes, values and beliefs. For all of these reasons, legal advice is recommended to ensure that one’s wishes and objectives are achieved in planning for incapacity.

This is the ninth 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; part eight: Powers of attorney and advanced care planning: Wish list.

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