

Powers of Attorney, Living Wills and Planning for Incapacity

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1. Introduction

A power of attorney is a legal document which gives someone else (the “attorney”) the ability to make certain decisions on behalf of an individual (the “grantor”). Those decisions have the same legal authority as they would if made by the individual personally. It is as if the “attorney” legally becomes the person granting the power of attorney.

There are three types of powers of attorney in Ontario: a power of attorney for personal care; a continuing power of attorney for

property; and a general power of attorney for property. The most important difference between these three documents is that a power of attorney for personal care has no legal validity unless the grantor is mentally incapable or incapacitated with respect to the particular decision at hand. In contrast, powers of attorney for property may have legal effect immediately upon signing, or they may be written to come into effect only upon incapacity, or they may cease to have effect upon incapacity. Therefore, the notion of incapacity is central to understanding what powers of attorney are all about.

The other important thing to remember about the different powers of attorney is that an attorney is only authorized to make decisions in the area of decision making covered by the written document. Therefore, an attorney under a power of attorney for personal care has no authority to make decisions about an individual's property or money. An attorney under a valid continuing power of attorney for property has no power to make health care or personal care decisions on behalf of the grantor.

Powers of attorney are very powerful documents and as a result, they can be abused. However, they can also be very useful tools for managing money and personal affairs during periods of incapacity or hospitalization, and ensuring that your wishes about your health care are honoured when you cannot express them yourself.

This chapter describes what powers of attorney are, when and how they should be

used, and what happens when someone becomes mentally incapable but does not have a power of attorney. It also explains what living wills are and what legal effect they have.

The law in this area is sometimes referred to as “substitute decision making” and is generally contained in two provincial statutes: the *Health Care Consent Act*; and the *Substitute Decisions Act*. The *Substitute Decisions Act* governs the creation and revocation of powers of attorney and in addition, deals with substitute decision making in property matters. The *Health Care Consent Act* deals with how personal care decisions are made for incapable people, whether by an attorney under a power of attorney for personal care, or by someone else. Where there is a gap in these statutes, the “common law”, or judge made law prevails.

This chapter begins with a list of definitions of terms which are used in this chapter and is placed here for ease of reference.

2. Definitions

advance directive - the stated wishes of a person about their personal care, whether in writing or expressed orally, which are made prior to the person becoming incapable (also called “prior capable wishes”)

assessment - a procedure in the *Substitute Decisions Act* where one’s ability to know and understand the consequences of making, or failing to make, certain decisions is evaluated by an assessor

assessor - a person authorized to do assessments under the *Substitute Decisions Act*; assessors must be either a doctor, nurse, psychologist, certified social worker, or occupational therapist; they must have

completed a special training course; and have professional liability insurance of not less than \$1,000,000

attorney - the person in a power of attorney who has the power to act on behalf of another

capacity - the ability to understand information that is relevant to making a decision, or the ability to understand the reasonably foreseeable consequences of a decision or the failure to make a decision (also “capable”)

care facility - an old age home, nursing home or rest home (hospitals and psychiatric facilities are not care facilities)

continuing power of attorney for property - a written document which allows an attorney to make decisions about another person’s property and which continues to be valid after the grantor becomes incapable

donor - the person who grants an attorney the power to make decisions on their behalf in a power of attorney

evaluator - a person who determines under the *Health Care Consent Act* whether or not a patient is capable of giving consent to the admission into a care facility, or consent to a personal assistance service (an evaluator must be an audiologist or speech-language pathologist; a nurse; an occupational therapist; a doctor; a physiotherapist; or a member of the College of Psychologists of Ontario)

general power of attorney for property - a written document which allows an attorney to make decisions regarding the grantor’s property while the grantor is capable

grantor - the same as a “donor”

guardian of property - a court appointed person who manages another's property

guardian of the person - a court appointed person who makes personal care decisions on behalf of an incapable person

living will - a particular type of written advance directive that is common in the HIV/AIDS affected communities

partner - two people are "partners" for the purpose of substitute decision making if they have lived together for at least one year and have a close personal relationship which is of primary importance to both of them

personal assistance service - is professional help, when provided in a nursing home, with routine personal matters like washing, eating, drinking, walking, or any other routine activity of daily living

personal care - decisions pertaining to health care, treatment, nutrition, hygiene, place of residence, clothing, and personal safety

power of attorney for personal care - a written document which appoints an attorney to make personal care decisions on behalf of another person when that person is incapable of doing so on their own behalf

Public Guardian and Trustee - a government appointed official who sometimes acts as an attorney, a statutory guardian of property, a guardian of property, or a guardian of the person and who has other duties in relation to decisions which have to be made on behalf of incapable persons

spouse - for the purposes of substitute decision making, two people are spouses if they are of the opposite sex and are: married

and not legally separated; or, they have lived together as common law spouses for at least one year; or they live together and have had a child together; or, they have entered into a cohabitation agreement under the *Family Law Act* (same sex couples are never "spouses" but may be "partners")

substitute decision maker - a general term which is applied to attorneys or anyone else who has legal authority to make decisions on behalf of someone else

statutory guardian of property - a person who has control over another person's finances pursuant to sections 15 or 16 of the *Substitute Decisions Act*, because they are either: in a psychiatric facility and a certificate of incapacity has been issued under the *Mental Health Act*; or, an assessment has been done by an assessor and the person has been found to be incapable of managing their own finances

treatment - includes everything that you would normally think of as treatment or a course of treatment, including diagnostic tests (like an HIV test); but does not include assessments, general examinations, the taking of a health history, the communication of a diagnosis, the admission of a person into a care facility, and personal assistance services

3. Personal Care Decisions

Before discussing the power of attorney for personal care, it is important to explain in what context they are used. Personal care decisions are decisions pertaining to health care, treatment, nutrition, hygiene, place of residence, clothing, and personal safety. It is presumed by law that every individual is capable of making these decisions for him or her self. As long as an individual is mentally capable of making these kinds of decisions,

a power of attorney for personal care has no relevance or meaning.

The *Health Care Consent Act* sets out how some personal care decisions are to be made when someone becomes mentally incapable. There are many decisions of a personal care nature which are not included in the *Act*. For those decisions which fall outside the *Act*, the old “common law” principle of no treatment without consent is still the law.

The *Act* places personal care decisions into three categories: health care treatment; admission to care facilities; and personal assistance services. The differences between these three categories of decisions are important because the *Act* deals with these three categories differently.

When a health care provider proposes “treatment”, they are responsible for determining whether the patient is capable of giving consent to that particular treatment. For decisions concerning admission into a care facility or personal assistance services, an “evaluator” must determine whether or not a patient is capable of giving consent. An “evaluator” is: an audiologist or speech-language pathologist; a nurse; an occupational therapist; a doctor; a physiotherapist; or a member of the College of Psychologists of Ontario.

When a finding of incapacity has been made, someone has to be found who can make these decisions on behalf of the incapable person. This person is a “substitute decision maker”. A power of attorney for personal care is a legal document which assigns the role of substitute decision maker to a person or persons of your choice. If you do not have an attorney under a power of attorney for personal care, the *Health Care Consent Act* designates who your substitute decision maker is. Regardless of whether or not your

substitute decision maker is an attorney or someone else designated by the statute, how the substitute makes decisions and what criteria are to be considered remains the same. Because of this, the section below called “Making Personal Care Decisions” should be read as applying to all kinds of substitute decision makers under the *Health Care Consent Act*.

3.1 The Power of Attorney for Personal Care

A power of attorney for personal care is a written document which gives a person (the attorney) the power to make personal care decisions on behalf of another (the grantor), but only when the grantor is *incapable* of making those decisions themselves. The word “incapable” in this context means that the grantor must be: (1) unable to understand information relevant to making a particular decision; and (2) unable to understand the reasonably foreseeable consequences of making the decision, or, the consequences of not making the decision. A person can be incapable for one decision, but not for a different one. In practice, this means that care providers and attorneys must try and ascertain the wishes of the grantor for each decision to be made and determine whether or not the grantor is capable with regards to that particular decision.

3.1.1 Creating a Power of Attorney for Personal Care

In order to create a power of attorney for personal care, the grantor must be at least sixteen years of age.

The grantor must also be able to understand two things in order to be deemed capable of making a power of attorney for personal care: (1) whether or not the proposed

attorney is genuinely concerned about the grantor's well-being and; (2) that the attorney may one day have to make decisions on the grantor's behalf. This test of capacity for making a power of attorney for personal care is not the same test of capacity for making personal care decisions. So one may be incapable of making a personal care decision but still capable of creating a power of attorney.

This difference in the meaning of "capable" is important. For example, if the grantor is incapable of making treatment decisions, but capable of granting a power of attorney, then the power of attorney should not contain directions for the attorney about specific care decisions, because at the time of signing the grantor was incapable of making that treatment decision. Instructions with respect to decisions contained in a power of attorney for personal care are only valid and binding on the attorney if the grantor was capable of making that decision at the time the power of attorney was signed.

A power of attorney for personal care must be in writing, it must name at least one person to act as an attorney, and it must be signed by the grantor. The grantor's act of signing has to be watched by two people ("witnessed") who then also sign as witnesses ("executed"). The attorney must be explicitly authorized to make personal care decisions on behalf of the grantor when the grantor becomes incapable.

Certain people cannot be witnesses:

- ☒ the attorney;
- ☒ the attorney's spouse or partner;
- ☒ the grantor's spouse or partner;
- ☒ children of the grantor (including children you treat as your children but who are not in fact your children by birth);
- ☒ people who have guardians; or

- ☒ anyone less than eighteen years old.

There are also some classes of people who cannot act as attorneys for personal care. Basically, anyone who is paid to deliver health, residential, social, training, or support services to a grantor cannot act as their attorney, unless the service provider is also the grantor's spouse, partner, or relative. This means that a worker employed by an AIDS Service Organization cannot be the personal care attorney for any of the organization's clientele (unless they are relatives).

The Public Guardian and Trustee can be named as the attorney in a power of attorney for personal care, but only if written consent is obtained from the Public Guardian and Trustee's office in advance. Call or write the Public Guardian and Trustee at:

Office of the Public Guardian and Trustee
8th Floor, 595 Bay Street
Toronto, Ontario, M5G 2M6
Telephone: (416) 314-2800; 1-800-366-0335
Facsimile: (416) 314-2716

3.1.2 Revoking a Power of Attorney for Personal Care

A power of attorney for personal care is automatically revoked when the grantor creates a new one, or dies, or when all the named attorneys die, resign, or become incapable of making personal care decisions. It is possible to create a new power of attorney for personal care without automatically revoking the old one by inserting a clause saying that the grantor intends to create multiple powers of attorney for personal care.

A power of attorney for personal care is also revoked when a court appoints a guardian of

the person under section 55 of the *Substitute Decisions Act*.

When the grantor dies there are no more personal care decisions to be made and so after the grantor's death a power of attorney for personal care has no meaning. Instructions about what are to happen to the grantor's remains after death must be contained in a will; they have no force or effect if placed in a power of attorney.

A power of attorney for personal care can also usually be revoked by creating a revocation document. Such a document does not have to be in any particular form, but it must be signed, witnessed by two witnesses, and executed exactly the same way as is necessary to create a power of attorney for personal care.

A revocation document can only be created if the grantor is "capable". In this case, the word "capable" means the same thing as it does for creating a power of attorney for personal care: does the grantor understand whether or not the attorney is genuinely concerned about their well-being; and does the grantor appreciate that the attorney will no longer have the ability to make decisions on his or her behalf?

There are some powers of attorney for personal care which cannot be revoked in this manner but which require that an assessor perform an assessment. This process is necessary only when the power of attorney for personal care contains clauses sometimes referred to as "Ulysses clauses" and the power of attorney was executed pursuant to section 50 of the *Substitute Decisions Act*. (For an explanation of what Ulysses clauses are and how powers of attorney for personal care which contain them are created, see: 3.1.3 "The Attorney's Powers".)

To revoke a power of attorney for personal care which contains Ulysses clauses and was executed under section 50 of the *Substitute Decisions Act*, the grantor must undergo an assessment within the thirty day period prior to signing the revocation document. The assessment must be done by an assessor. It must be written and in a form which is specifically required for this purpose. The assessment must state that on a date specified in the statement, the assessor performed an assessment of the grantor's capacity, determined that the grantor was capable of making personal care decisions at that time, and set out the facts on which the assessor's opinion is based.

3.1.3 The Attorney's Powers

The first thing that any attorney must do is examine the power of attorney and ascertain whether or not they have the original document. Only the original confers decision making powers on the attorney. Then the attorney should read the document carefully and make sure they understand the instructions it contains.

A power of attorney for personal care may name more than one person to act as an attorney. If a power of attorney names more than one person as attorney it is important for the attorneys to look at the language in the power of attorney carefully and figure out how they are supposed to act. Are they supposed to act together? Are they each empowered to act independently of one another? Are they alternatives so one is only empowered to act if the other will not?

Sometimes the power of attorney will contain language like: "I name John Smith to act as my attorney for personal care and if he is unwilling, incapable, or unable to act then I name Mary Smith as my attorney for

personal care.” This means that Mary Smith has no powers under the power of attorney whatsoever unless John Smith refuses to act as attorney, dies, becomes incapable of making personal care decisions, or is otherwise unable to act as attorney.

Sometimes the power of attorney will say: “I name John Smith and Robert Jones to act as my attorneys jointly and severally.” This language means that the grantor’s intent was that the two attorneys would both be empowered to act individually and would not need to make decisions together.

If the power of attorney names multiple attorneys and none of the language used above is in the document, then there is a presumption that the grantor’s intent was that the attorneys must act “jointly”. This means that the attorneys must both be consulted and they must agree on the decisions to be made on behalf of the grantor.

Clearly there is potential for trouble if joint attorneys do not agree on the decision to be taken. Some powers of attorney contain dispute resolution clauses for such situations. For example: “I name Chris Smith and Brenda Jones as my attorneys but in the case of any disagreement between them, Chris Smith shall make the decision.” Some powers of attorney name an odd number of attorneys and state that decisions will be made jointly, but in the case where disagreement arises, decisions shall be made by the majority of the attorneys.

Where the power of attorney does not create a mechanism to settle disputes and there are multiple attorneys who do not agree on whether or not to consent to a certain treatment, then the *Health Care Consent Act* says that the Public Guardian and Trustee shall make the decision.

When attorneys are faced with making treatment decisions on another person’s behalf they have the right to obtain from the medical team the information they need to answer their questions.

An attorney can normally consent to anything that the grantor could consent to when capable. There are some exceptions though. Primarily the exceptions involve the use of force, and the admission of a person into a psychiatric facility where the grantor (whether capable or not) voices his or her objections. An attorney under a power of attorney for personal care can only consent to the use of force or the admission of an objecting grantor into a psychiatric facility for treatment, if the power of attorney for personal care contains certain special clauses and was executed in a special way. These clauses are sometimes called “Ulysses clauses” and are found in section 50 of the *Substitute Decisions Act*.

The following provisions can only be included in a power of attorney for personal care if section 50 of the *Act* is complied with:

- ☒ a provision authorizing the attorney to use force in order to determine whether or not the grantor is capable; or
- ☒ a provision authorizing the attorney to use force in treating the grantor or admitting the grantor to any place for care or treatment; or
- ☒ a provision which says that the grantor gives up his or her right to apply to the Consent and Capacity Review Board for a review of the grantor’s capacity.

In order for a power of attorney for personal care containing clauses like these to be

valid, the grantor must undergo an assessment within thirty days of signing the power of attorney. The assessor must state in writing on a required form that an assessment was done, that the grantor was capable of making personal care decisions at the time of the assessment, and that the grantor understood the consequences of the clauses. The assessor must indicate on what facts his or her opinion is based. The grantor must also sign a required statement saying that the grantor understands the effect of the clauses in the power of attorney for personal care. The grantor's statement must be signed within thirty days of signing the power of attorney for personal care.

If a valid power of attorney for personal care with Ulysses clauses exists, and force is used to do the things listed in it, the grantor has no right to sue anyone who uses force to do those things authorized by the power of attorney for personal care.

Attorneys have the right to resign. If the attorney has never exercised any powers under the power of attorney for personal care, then all the attorney has to do to resign is notify the grantor that he or she is resigning and take reasonable steps to give notice of the resignation to important people. Important people would include anyone who might reasonably be expected to need to deal with an attorney acting on the grantor's behalf in the future. Normally, this would mean giving notice to the care team of the grantor.

If you have exercised powers under a power of attorney for personal care, resigning is a bit more complicated. Before your resignation is effective you must give a copy of the notice of resignation to the grantor and any other attorneys or substitute attorneys. If there is no substitute attorney named, or the substitute is unwilling to act

as the attorney, then the attorney who wants to resign must also give notice to the grantor's spouse or partner, and all known relatives living in Ontario. The requirement to give notice to the spouse or partner and relatives may be done away with if the power of attorney says it is not necessary. Finally, the resigning attorney has to make reasonable efforts to give notice of the resignation to anyone who the attorney has dealt with on behalf of the grantor in the past, and to anyone who might likely need to deal with an attorney acting on the grantor's behalf in the future.

3.2 Making Personal Care Decisions

When the attorney or substitute decision maker is trying to make decisions about the grantor's personal care, there are certain factors, listed in the *Health Care Consent Act*, that the substitute must take into account. Those factors are slightly different for the three kinds of decisions which have to be made: health care treatment decisions; admission into care facilities; and personal assistance services.

3.2.1 Health Care Treatment Decisions

Health care treatment includes everything that you would normally think of as treatment or a course of treatment, including diagnostic tests (like an HIV test). It does not include: assessments, general examinations, the taking of a health history, or the communication of a diagnosis. It also does not include "a treatment that in the circumstances poses little or no risk of harm to the person".

First, the attorney must follow any known wishes of the grantor which were expressed when the grantor was capable and at least sixteen years of age and which are applicable to the decision which must now

be made. These prior known wishes may be in writing, but they also may have been orally stated when the grantor was capable. Prior known wishes are also called “advance directives”. A “living will” is a particular form of advance directive which is familiar to many people in the HIV affected communities.

Living wills can become a power of attorney for personal care when they meet the requirements of the *Substitute Decisions Act* for powers of attorney for personal care: a substitute decision maker is named and authorized to act on behalf of the person making the living will during periods of incapacity; and the document is signed by the grantor and witnessed by two people who are not forbidden to be witnesses under the *Act*.

The University of Toronto Joint Centre for Bioethics has a web-site where a living will specifically created for people with HIV can be found. The web-site address for their living will is: www.utoronto.ca/jcb/hivlw.htm.

Advance directives, or living wills, are particularly useful if the grantor wishes to instruct the attorney or substitute decision maker to refuse certain treatment. This is because in the absence of an advance directive or prior known wishes regarding the refusal of treatment, the attorney must then act in the incapable person’s “best interests”.

In deciding what the incapable person’s best interests are, the attorney must take into account non-specific wishes expressed by the grantor in any advance directives or living wills, and the values and beliefs that the attorney knows the grantor holds and would wish to be followed. In addition, the attorney must consider the likely impact of

the treatment on the grantor by asking him or herself the following kinds of questions:

- will the grantor get better or improve if he or she has the treatment?
- will the treatment stop the grantor’s condition from getting worse?
- will the treatment slow the rate of deterioration of the grantor’s condition?
- is the grantor’s condition likely to improve, remain the same or deteriorate *without* the treatment?
- does the potential benefit of the treatment outweigh the risk of harm to the grantor from the treatment?
- are there less restrictive or less intrusive treatments which would be just as beneficial to the grantor?

An attorney under a valid power of attorney for personal care is supposed to keep records of all the health care, safety, and shelter decisions made on behalf of the incapable person. The records should include the nature of the decision, why the decision was made and on what date. Medical reports relating to each decision should be obtained and kept on record. The names of people consulted, including the incapable person, should be recorded for each decision. The wishes which the incapable person expressed before they became incapable which are pertinent to the decision made should also be recorded. What the incapable person says about their wishes when consulted should be noted if he or she says anything relevant to that decision. The attorney should also record his or her opinion about the list of factors which are included above.

These records are confidential and the attorney is responsible for them. He or she should only disclose the records when requested and only to: the incapable person;

the incapable person's attorney under a continuing power of attorney for property; or a court appointed guardian of property. Your attorney may also disclose the records if doing so would be consistent with your best interests, or if ordered by a court to do so.

The attorney should save the records until you get better and are capable again and then turn them over to you. If you do not get better, but die, then the attorney is supposed to give the records to the administrator of your estate. If you appoint a different attorney for personal care, the former attorney should turn over the records to the new one.

The requirement to keep these records and what to do with them does not apply to substitute decision makers who are not attorneys or guardians of the person.

3.2.2 Emergencies

There is a general rule that health care providers are required to obtain informed consent before commencing treatment. Sometimes obtaining informed consent is difficult because of language barriers or communication problems caused by a disability. Where such barriers cannot be resolved without undue delay which would put the patient at risk, and an emergency exists, you can be treated without your consent as long as "there is no reason to believe" that you do not want the treatment. If you are experiencing severe suffering, or are at risk of sustaining serious bodily harm if not treated promptly, then an emergency exists.

If a patient is incapable and there is an emergency, the health care provider is still supposed to try and obtain consent from the appropriate substitute decision maker. In

emergencies, where the delay necessitated in contacting the substitute decision maker would prolong suffering or put the patient at risk, a health care provider can go ahead and treat the patient.

In emergencies a health care provider can override the refusal of consent to treatment by a substitute decision maker in certain circumstances. If the health care provider believes that in refusing consent the substitute decision maker has failed to take into account the factors which are supposed to be considered (see: 3.2.1 Health Care Treatment Decisions above for a discussion of these factors) then the health care provider can go ahead and treat. This is not true if the health care provider is told that when capable the patient expressed the wish that such treatment should be refused.

3.2.3 Admission into Care Facilities

A "care facility" is a nursing home or an old age home. So regular hospitals and psychiatric facilities are not "care facilities". Therefore, the rules about care facilities in the *Health Care Consent Act* do not apply to hospitals or psychiatric facilities.

Applications for admittance into care facilities in Ontario is centralized on a regional basis. If you are capable with respect to making decisions about entering into a care facility, then you cannot be forced to enter one against your will. However, if an evaluator determines that you are incapable of making such a decision, you can be admitted to a care facility without consent in certain circumstances. Those circumstances are where you are in "crisis" and your substitute decision maker cannot be reached despite reasonable efforts being made to do so. Being in "crisis" means that your admission is necessary for your well-being.

If an evaluator finds that you are incapable with respect to decisions about care facilities, you can usually appeal that decision to the Consent and Capacity Review Board. You cannot appeal to the Board in these circumstances if you have created a valid power of attorney for personal care under section 50 of the *Substitute Decisions Act* which states that you waive your right to appeal to the Board. You also cannot appeal if you have a court appointed guardian empowered to make admission decisions. While you are waiting for your appeal to be heard, you cannot be admitted into a particular care facility in the meantime, unless you are in crisis or your stay in the care facility is scheduled to be less than ninety days.

When you are found to be incapable your substitute decision maker can consent or refuse consent to admission into a care facility on your behalf. The same rules apply about who your substitute is as are found above in the context of treatment decisions. Similarly, in making the decision on your behalf the substitute must consider the same sorts of factors: your prior known wishes while you were capable; and your best interests. In these circumstances, your best interests would include a consideration of whether or not a less restrictive environment for you might be available.

3.2.4 Personal Assistance Services

A “personal assistance service” is professional help with routine personal matters like washing, eating, drinking, walking, or any other routine activity of daily living; but only when provided in a nursing home or home for the aged.

Basically, the same principles applicable to treatment decisions and decisions about admission into care facilities apply.

3.3 When There Is No Power of Attorney for Personal Care

If you do not have a power of attorney for personal care and you subsequently become incapable of making personal care decisions, the *Health Care Consent Act* names who your “substitute decision maker” is. An attorney under a power of attorney is one example of a substitute decision maker. In the absence of an attorney, the *Act* indicates who is to perform that role.

The *Act* contains a list of people who may be the substitute decision maker. The list is virtually the same for all three categories of personal care decisions. Therefore, for the purpose of figuring out who the substitute decision maker is for an incapable individual, it does not matter what kind of decision needs to be made.

The health care provider is supposed to find an incapable person’s substitute decision maker by starting at the top of the list and working down until he or she finds someone.

The first person on the list is the incapable person’s guardian of personal care. This is a court appointed person to whom the court has explicitly given the power to make personal care decisions on the incapable person’s behalf. If there is no guardian, the health care provider must look to the second person on the list, who is the attorney under a power of attorney for personal care. Where there is no attorney, the health care provider must then try to find out if someone has been appointed by the Consent and Capacity Review Board to be the incapable person’s substitute decision maker.

Those three categories of people take precedence over everyone else. If none of them can be found then the health care

provider then turns to one of the following people in this order:

1. The patient's spouse or partner;
2. The patient's child or a parent with custody. If Children's Aid has care and control of the patient then Children's Aid takes the place of the parent in this list.
3. The patient's parent who only has access, not custody.
4. Any brothers or sisters of the patient.
5. Any other relative (by blood, marriage or adoption) of the patient.
6. The Public Guardian and Trustee.

As the health care provider works his or her way down the list, certain questions have to be asked of the potential substitute decision maker. First, the substitute decision maker must be at least sixteen years old and capable with respect to making treatment decisions. They must not be prohibited by court order or separation agreement from giving or refusing consent on the patient's behalf. They must be available to make the decision and they must be willing to take responsibility for giving or refusing consent. They should be asked if someone else higher up on the list is known to them. If there is someone higher up on the list known to them, and that person is a guardian of the person, an attorney for personal care or a person appointed by the Consent and Capacity Review Board, then they cannot be asked to make the decision on the incapable person's behalf. If the person higher up on the list is not one of those three people, then they can make the decision if they believe that the person above them would not object to them making the decision.

Sometimes there will be more than one person at the same level on the list; two brothers for example. The two brothers are supposed to work together to reach a

decision. If they cannot and there is a disagreement between them about refusing or giving consent to treatment, then the health care provider cannot simply move down the list to the next rung of relatives. Instead, the Public Guardian and Trustee has to make the decision.

Understanding the order of this list is important for people who may become sick and then incapable. If the first person on the list is someone you really do not want making treatment decisions for you, then you should take the time to create a power of attorney for personal care to name someone else. If the first person on the list is the person you want making treatment decisions for you anyway, then creating a power of attorney for personal care is not as important.

3.3.1 Representatives Appointed by the Consent and Capacity Review Board

Where there is no court appointed guardian of the person, or an attorney under a power of attorney for personal care, the Consent and Capacity Review Board can appoint someone else to make specific treatment decisions on an incapable person's behalf.

The Board also has the power to appoint a representative to make decisions on behalf of an incapable person about placement into a care facility, or to make decisions about "personal assistance services".

An application to the Board to appoint a representative to make treatment decisions for an incapable person can be started by the incapable person. It can also be started by someone who wants to be appointed the representative of the incapable person, but a representative will not be appointed over the incapable person's objections.

The person making the application has to fill out an application form. Forms are sometimes available from the hospital or care facility itself but can also be obtained by calling 1-800-461-2036. Applications are normally faxed to the nearest regional office of the Consent and Capacity Review Board. The Regional Offices are:

Toronto

Suite 906, 94 Cumberland St.
Toronto, ON, M5R 1A3
Telephone: (416) 968-6575
Fax: (416) 968-3424

Kingston

Howard Maitland Building
Suite 102, 780 Midpark Dr.
Kingston, ON, K7M 7P6
Telephone: (613) 384-7132
Fax: (613) 384-9648

North Bay/Sudbury

#207-240 Algonquin Ave.
North Bay, ON, P1B 4V9
Telephone: (705) 472-6440
Fax: (705) 472-3426

Penetanguishene

34-A Clapperton St.
Barrie, ON, L4M 3E7
Telephone: (705) 737-0111
Fax: (705) 734-0046

Hamilton/Guelph

Ste.106, 20 Hughson St. South
Hamilton, ON, L8N 2A1
Telephone: (905) 523-6000
Fax: (905) 523-6006

London

341 Talbot Street, 2nd Floor
London, ON, N6A 2R5
Telephone: (519) 438-7811
Fax: (519) 660-4857

Ottawa

9th Fl., 427 Laurier Ave. W.
Ottawa, ON, K1R 7Y2
Telephone: (613) 782-3207
Fax: (613) 238-8507

Thunder Bay/Kenora

1020 Victoria Ave. E., Box 125
Thunder Bay, ON, P7C 4V5
Telephone: (807) 623-4442
Fax: (807) 623-8140

The Board is supposed to hold a hearing within seven days of receiving an application. The hearings are usually held at the hospital or treatment facility where the incapable person is being treated.

3.3.2 Court Appointed Guardians of the Person

Under the *Substitute Decisions Act* any person can apply to the General Division of the Ontario Court of Justice and ask to be appointed as the guardian of the person for an incapable individual. People who provide care services to the incapable person for money cannot be appointed as guardians of that person, unless they: are also a relative; or, are their attorney under a power of attorney for personal care; or, their attorney

under a continuing power of attorney for property; or, are their guardian of property; or, there is no other suitable person willing and able to act as a guardian. The *Act* specifically instructs the court not to make a guardianship order if there is a less restrictive way of substitute decision making.

Because guardianship is a court ordered process, people generally need a lawyer to be able to make the application. It can also be quite expensive as you need to file two assessor's certificates with the application. This is true even though there is a "summary" application procedure available where no court appearance is necessary.

When deciding if the proposed guardian is an appropriate person to appoint, the court is supposed to consider whether or not that person is an attorney under a power of attorney, how close he or she is with the patient, and the incapable person's current wishes if they can be expressed.

In very limited circumstances the Public Guardian and Trustee has the power to apply for temporary guardianship. If the incapable person is at risk of serious illness, injury, loss of liberty or personal security, then the Public Guardian and Trustee is supposed to investigate and if necessary, can apply for temporary guardianship.

4. Making Decisions Concerning Managing Property

The major difference between property substitute decision making and personal care is that there is no list of substitutes if you do not have an attorney or guardian. In other words, if you become sick and are hospitalized, no one can handle your property for you without a valid continuing power of attorney for property, or a court

order, except the Public Guardian and Trustee.

For people with HIV this can cause very serious problems. If you are hospitalized and incapable of handling your bills, you still need someone to pay the rent and the phone bill, and open your mail. For this reason, it is highly recommended that you consider appointing an attorney under a valid continuing power of attorney.

4.1 The Continuing Power of Attorney for Property

A continuing power of attorney for property is a written document which allows one person (the attorney) to make decisions about another person's (the grantor's) property, even when the grantor becomes incapable. Regular powers of attorney for property become ineffective when the grantor becomes incapable.

This means that you have to be careful to make sure your power of attorney for property meets the requirements for continuing powers of attorney for property laid out in the *Substitute Decisions Act* if you want your attorney to be able to handle your affairs when you get sick.

The other thing people should remember about powers of attorney for property is that unlike powers of attorney for person care, they come into effect immediately upon signing. This means that if you have signed a valid power of attorney for property, your attorney can access your money regardless of whether or not you are sick and incapable or not. To avoid this problem, you can insert a clause in your continuing power of attorney for property saying it only comes into effect upon incapacity, or when you are in the hospital.

It is also important to understand that an attorney under a continuing power of attorney for property is entitled to be paid for managing your property and is allowed to draw money from you for that purpose. If you do not want your attorney to have that right it is important that you insert a clause in your continuing power of attorney for property stating that your attorney can take no compensation for acting as your attorney.

4.1.1 Creating a Continuing Power of Attorney for Property

In order to be able to create of power of attorney for property, the grantor must be at least eighteen years old.

In addition, the grantor must also be "capable" of granting a continuing power of attorney for property. To be capable of granting a continuing power of attorney:

- ☒ you must know what property you have and its approximate value;
- ☒ you must also be aware of your financial obligations to your dependants;
- ☒ you must understand that your attorney will have the power to deal with your money and all your property (but cannot make a will for you);
- ☒ you must be aware of the fact that he or she might misuse their authority;
- ☒ you must understand that the value of your property may decline if the attorney is not careful;
- ☒ you know that the attorney must account for how he or she deals with your property; and
- ☒ you must comprehend that you can revoke the continuing power of attorney.

You can be incapable of managing your own property but still capable of granting a continuing power of attorney for property.

A continuing power of attorney for property must be in writing, it must name at least one person to act as an attorney, and it must be signed by the grantor. The grantor's act of signing has to be watched by two people ("witnessed") who then also sign as witnesses ("executed").

Certain people cannot be witnesses:

- ☒ the attorney;
- ☒ the attorney's spouse or partner;
- ☒ the grantor's spouse or partner;
- ☒ children of the grantor (including children you treat as your children but who are not in fact your children by birth);
- ☒ people who have guardians; or
- ☒ anyone less than eighteen years old.

As you will recall, there are limitations on who can be an attorney under a power of attorney for personal care. This is not true under a continuing power of attorney for property. You can appoint anyone who is at least eighteen years old and who is capable of managing property, including a corporation. It is very common for trust companies to act as the attorney under a power of attorney for property. This also means that AIDS Service Organizations and their employees can act as attorneys under a continuing power or attorney for property.

The Public Guardian and Trustee can also be named as the attorney in a continuing power of attorney for property, but only if written consent is obtained from the Public Guardian and Trustee's office in advance. Call or write the Public Guardian and Trustee at:

Office of the Public Guardian and Trustee
8th Floor, 595 Bay Street
Toronto, Ontario, M5G 2M6
Telephone: (416) 314-2800; 1-800-366-0335
Facsimile: (416) 314-2716

It is very important that you remember that a power of attorney for property takes effect immediately upon signing. This means that as soon it is signed, your attorney has authority to deal with your property. This is different from a power of attorney for personal care.

It is strongly recommended that you have a clause in your continuing power of attorney for property that states when you want it to take effect.

4.1.2 Revoking a Continuing Power of Attorney for Property

Like a power of attorney for personal care, a continuing power of attorney for property is automatically revoked when the grantor creates a new one, or dies, or when all the named attorneys die, resign, or become incapable of managing property. However, it is possible to create a new continuing power of attorney for property without automatically revoking the old one by inserting a clause saying that the grantor intends to create multiple continuing powers of attorney for property.

A continuing power of attorney for property is also revoked when a court appoints a guardian of property under section 22 of the *Substitute Decisions Act*.

Like a power of attorney for personal care, a continuing power of attorney for property ceases to have any legal affect after the grantor's death. Instructions about what are to happen to the grantor's remains or personal effects after death must be contained in a will; they have no force or effect if placed in a power of attorney.

A continuing power of attorney for property can also be revoked by creating a revocation document. Such a document does not have

to be in any particular form, but it must be signed, witnessed by two witnesses, and executed exactly the same way as is necessary to create a continuing power of attorney for property.

A revocation document can only be created if the grantor is “capable”. In this case, the word “capable” means the same thing as it does for creating a continuing power of attorney for property:

- ☒ the grantor must know what property he or she has and its approximate value;
- ☒ be aware of financial obligations to dependants; and
- ☒ understand that the attorney will no longer have the power to deal with the grantor’s money and property.

This test of capacity is not the same as the test for capacity to manage property. This means that a grantor can revoke a continuing power of attorney for property even if she or he is not capable of managing their own property themselves.

4.1.3 The Attorney’s Duties and Powers

An attorney under a continuing power of attorney has almost all of the duties of a court appointed guardian of property. An attorney or a guardian is a “fiduciary”, which means that he or she must act in good faith, openly, with integrity and honesty. A fiduciary must always put first and foremost the well-being of the incapable person.

This means that if someone else is the substitute decision maker for personal care decisions, the attorney under a continuing power of attorney for property must spend money in accordance with the decisions of the personal care decision maker. The goal is not to preserve the property of the grantor,

but to foster his or her physical well-being first. Financial well-being comes second.

Although it is the general rule that physical well-being comes first over financial well-being, there is an exception. Where the adverse financial consequences outweigh the benefits of the personal care decision, financial considerations come first. Let’s say your personal care decision maker thinks it is in your best interests to spend the winter in the south. You will be more comfortable, your breathing will improve, and you will not get your annual serious case of the flu. In order for you to be able to afford to go south for the winter your attorney will have to sell your house. The money obtained from the sale of your house will only last for one year and you have a life expectancy of two years or more. In these circumstances, what may be good for your health will have very serious adverse consequences on your financial circumstances. And as you will probably live longer than the one year you can afford to go south, the health benefits are outweighed by the bad financial consequences.

An attorney has to keep accounts of all transactions involving the incapable person’s property. Attorney’s under a continuing power of attorney for property have the right to charge you for managing your affairs. You can take away that right by inserting a clause in your continuing power of attorney for property that says that the attorney has no right to take compensation.

If your attorney is acting for free, he or she has to look after your affairs with the same degree of care that the average person would use in managing their own money. If your attorney is taking compensation for managing your affairs, he or she must perform the task as if they were in the

business of professional property management.

An attorney who fails to meet this standard is liable for any losses of the grantor's property caused by the attorney's actions. So if your attorney foolishly spends your money, he or she can be sued.

An attorney under a continuing power of attorney has to explain to the incapable person what is happening with his or her money, and try and get input from the incapable person about decisions. The attorney also has a duty to try and encourage contact between the incapable person and supportive family members and friends. An attorney should consult with those people and the personal care decision maker regularly.

One of the first things that an attorney under a power of attorney for property should do is find out if the grantor has a will and what it says. This is because the attorney is responsible for making sure that property you want to leave to someone in particular is preserved. Let's say you have a particularly nice antique bed which you have specifically left to a former lover in your will. The attorney may sell all your furniture to help support your health care needs, but should not sell that bed unless it is absolutely necessary. It is the last thing which should be sold to support your needs.

The attorney has the right to ask anyone for information about your property, and to ask anyone holding your property to turn it over to the attorney. So your attorney has the right to ask social assistance authorities to send your cheque to him or her.

Your attorney has to spend money which is necessary for your support and care. This is their most important duty. He or she must

also use your money to look after the people you are financially responsible for, like your children. However, your support and care always comes first. In addition, the attorney must try and meet your legal financial obligations like your bills. Both your care and that of your dependants comes before these other financial obligations.

The attorney also has the power to give away your property if what is left over is sufficient to meet your needs, those of your dependants, and your other legal obligations. The gifts can be to your friends and relatives, or to charity. Gifts to charity are only okay where there is evidence that you made similar gifts to charity in the past or where your continuing power of attorney for property says the attorney can make gifts on your behalf. There is also a cap on charitable gifts of 20% of your annual income in the year the gift is made. However, the cap can be overturned by a court. Despite this power to make gifts, the attorney must not make the gift over your objection. So even if you are incapable of managing your own property, your attorney must ask you if the gift is okay, and if you say no then the gift cannot be made. This is true of loans to family and friends as well.

If the attorney is confused and really does not know what decision should be made about your money, he or she can apply to the court for directions.

Basically, your attorney can enter into any contract on your behalf that you could when you were capable. He or she can sell anything you own, can terminate your tenancy, and buy things with your money. There is only one thing that your attorney cannot do with your property that you can do: decide who gets what when you die. An attorney cannot create a will on your behalf.