Société Alzheimer Society

Power of Attorney ~ Personal Care

Many Canadians believe that because they have signed a Power of Attorney for Property their attorney can make personal care decisions for them too. 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, hygiene or nutrition. Powers of Attorney for Personal Care deal with the following matters:

- 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;
- The types of decisions an attorney is authorized to make regarding your care;
- Medical directives with respect to treatment;
- Provisions for payment of compensation to the attorney for the decision-making; and
- Provisions to protect the attorney from decisions that might be unpopular with some members of a family.

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 person's behalf by the following:

- A person appointed as a guardian of your person by court order, if the order includes a power to give or refuse consent;
- 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;
- 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;
- Your children;
- If you are a minor, your parents or a divorced parent who has only a right of access;
- Your brothers or sisters; and finally
- Any other relative.
- There are special rules with respect to minors whose parents are separated or where a children's aid society has custody.

Consequences of not having a Power of Attorney for Personal Care

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.

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Without a Power of Attorney for Personal Care

The persons listed above cannot give or refuse consent if someone on the list has greater priority, and even then, the person cannot give or refuse consent unless the person:

- has capacity to understand the problem, the proposed treatment, the risks, and the alternatives;
- is at least 16 years of age;
- is not prohibited by court order or separation agreement from giving such consent;
- is available to give or withhold consent within a time that is reasonable in the circumstances; and
- 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.

Who Can Be Appointed

It is obvious from the above that if no one is readily available to make health care decisions when 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. Great care and consideration needs to be given to whom you wish to appoint to make these crucial 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 should be someone that you trust will honour the decisions that you would make and would not necessarily substitute their own for yours.

Clarity in Stressful Situations

In addition to medical decisions, your Power of Attorney for Personal Care can outline and make decisions regarding:

- your health care
- nutrition
- hygiene
- clothing
- recreation
- social services
- education
- training

Make Your Wishes Known

If you have not discussed the above matters with your family, a Power of Attorney for personal care will give them guidance to them with respect to your wishes when you are not able to communicate them. Consider that it may be

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that your wishes for your own care 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, may appoint one or more of their children.

Types of Decisions

The *Health Care Consent Act, 1996*, requires your attorney to make health care decisions under that Act in accordance with the following principles:

- 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.
- If your attorney does not know your wishes, he or she must act in your best interest.
- In deciding what are your best interests, under the Health Care Consent Act, 1996, your attorney must consider the following:
- the values and beliefs your attorney knows you held while you were capable and believes you would act on if still capable;
- any wishes you have expressed with respect to treatments that are not required;
- whether or not the treatment is likely to:
    - improve your condition or well-being,
    - prevent your condition or well-being from declining;
    - reduced the extent to which, or the rate at which, your condition or well-being is likely to deteriorate;
- whether your condition or well-being is likely to improve, remain the same, or deteriorate without treatment;
- whether the benefit you might obtain from the treatment outweighs the risk of harm; and
- 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 are set out in the *Substitutions Decisions Act, 1992*. Those principles are:

- 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.
- If the guardian does not know of a wish or instruction then the decision is to be made in your best interests.
- In deciding what is in your best interest your attorney shall take into consideration:
    - the values and beliefs they know you held when capable and believe you would still act on if capable;
    - your current wishes if they can be ascertained; and, the following factors:

        whether the decision is likely to
        - improve the quality of your life;
        - prevent the quality of the person's life from deteriorating; or
        - shall reduce the extent to which or the right at which the quality of your life is likely to deteriorate;
        - whether the benefit you expect to obtain from the decision outweighs the risk of harm from an alternative decision.
        - the attorney is to choose the least restrictive and intrusive course of action that is available and appropriate.

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The Power of Attorney is to foster regular contact and consultation between an incapable person, the supportive family members and friends.

Medical Directives

Your Power of Attorney can contain your medical directives. But, it does not have to. It is 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 you may prefer to put them in writing as there can be no mistake in written wishes.

Many medical directives deal with near death situations. 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. If you are competent, your doctor will ask whether or not you wish to be resuscitated in extreme situations.

Considerations

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. You can be as specific as you want. For example, a person who is particular about hygiene can request daily or every other day showers when confined to a nursing home.

Changing Your Wishes

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 in your best interest 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 doctor-assisted death.

Talk to your Medical Professionals First

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 in the future.
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.

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Compensation

Many people making Powers of Attorney for Personal Care dislike the idea of compensating persons to make care decisions on their behalf. In many cases, compensation is uncommon, such as a spouse or child acting as a Power of Attorney. However, 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.

Protection of Attorney

The document should also contain some protection for the attorney regarding the crucial decisions he or she may make or fail to make. An example might be the situation of an attorney giving or withholding consent to treatment when the attorney has personal knowledge of the wishes of the person who appointed him or her, and the Power of Attorney contains no medical directive, and a child of the mentally incapable person disagrees with the decision made, and the child brings a Court application in an attempt to force the attorney to make another decision. Protect your attorney, you are asking your attorney to make crucial decisions on your behalf.

Conclusion

It should be obvious from the forgoing that most people should appoint someone to make care decisions on their behalf before they become mentally incapable. Like a Will, it should be reviewed and reconsidered every 3-5 years to ensure that any document signed now continues to reflect your wishes and that the attorney still has the capacity and willingness to act.

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