CLEO | Health and Disability Series

Power of Attorney for Personal Care

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If you speak French

In many cases, you have the right to government services and legal proceedings in French, including hearings before French-speaking decision-makers.

If you have a legal problem, you can ask a lawyer or a community legal clinic about your French language rights.

Si vous parlez français

Il existe de nombreuses situations où vous avez droit à des services gouvernementaux et à des procédures juridiques en français. Ainsi, vous pouvez avoir droit à ce qu'une audience à laquelle vous êtes partie soit tenue devant un décideur qui parle français.

Si vous avez un problème juridique, vous pouvez demander à un avocat ou à un intervenant d'une clinique juridique communautaire de vous informer des droits linguistiques liés au fait de parler français.

There are three kinds of Power of Attorney in Ontario:

- General Power of Attorney for Property,
- Continuing Power of Attorney for Property, and
- Power of Attorney for Personal Care.

This publication is about **Power of Attorney for Personal Care**.

Continuing Power of Attorney for Property is discussed in a separate publication. See the back cover for more information.

What is a Power of Attorney?

A Power of Attorney is a legal document that gives someone else the power to act on your behalf. This person is called your "attorney". In Canada the word "attorney" usually does not mean lawyer, as it does in the USA.

You can give someone a Power of Attorney for Personal Care if you want them to make personal care decisions on your behalf if you become mentally incapable of making them yourself. This is sometimes called a "personal power of attorney".

What are personal care decisions?

Personal care decisions are decisions about your health care and medical treatment, diet, housing, clothing, hygiene, and safety.

Why should I have a Power of Attorney for Personal Care?

If you become mentally incapable of making personal care decisions, someone else must make them for you. This person is called your "substitute decision-maker" (SDM).

For some decisions, including those about your medical treatment, the law says your doctor and other health care providers must get your substitute decision-maker's consent before taking action.

Making a Power of Attorney for Personal Care lets **you** choose a person you trust to be your substitute decision-maker if you become mentally incapable in the future.

Making a Power of Attorney for Personal Care is also a way to make sure your wishes about personal care decisions will be respected. It gives you a chance to say what you want and do not want. For example, if you do not want certain medical treatments if you get seriously ill, you can state this in your Power of Attorney.

What is the difference between a Power of Attorney for Personal Care and a Power of Attorney for Property?

A Continuing Power of Attorney for Property or a General Power of Attorney for Property gives your attorney the power to make decisions about your finances, home, and possessions. A Power of Attorney for Personal Care deals only with personal care decisions.

You can name the same person as your attorney for both property and personal care, or you can name different people.

When does a Power of Attorney for Personal Care take effect?

It takes effect **only if** you become mentally incapable of making some or all of your personal care decisions. On the other hand, a Continuing Power of Attorney for Property comes into effect as soon as it is signed and witnessed, unless you state otherwise.

Power of Attorney documents are often kept in a safe place to use only in the event of mental incapacity at a later date.

Who decides that I am mentally incapable of making personal care decisions?

It depends on the situation. In most cases, your attorney would decide this unless you name someone else in your Power of Attorney to "confirm" that you are mentally incapable.

If you do name someone else, your attorney cannot start making personal care decisions for you until that other person confirms that you are incapable of making decisions. If your attorney thinks you might be mentally incapable, they must arrange for that person to assess you and confirm your incapacity.

Who can I name to confirm that I am mentally incapable?

You can name a certain individual, such as your family doctor, another health professional, or even a personal friend. Or you can say it must be a certain **type** of professional, such as a social worker, psychologist, or nurse.

You can also state that you would like your mental incapacity confirmed without naming an individual or profession. If you do this, it will be confirmed by a "capacity assessor". This is someone trained and approved to determine mental incapacity.

Can anyone else decide that I am mentally incapable of making personal care decisions?

Yes. Sometimes the decision that you are mentally incapable is not up to your attorney or anyone else you name. This is true in situations concerning your:

- health treatment,
- admission to a long-term care facility, or
- need for personal assistance services, such as bathing and eating, while you are in a long-term care facility.

However, if this happens you have the right to have the decision reviewed by the provincial Consent and Capacity Board.

What is the Consent and Capacity Board?

The Consent and Capacity Board is an independent body that holds hearings to consider a variety of things, including:

- a review of an individual's capacity to make decisions about health treatment, personal assistance services, or admission to a long-term care facility,

- the appointment of a representative to make treatment decisions for someone who is incapable of making their own decisions, and
- a substitute decision-maker's request for guidance in making treatment decisions.

Who decides that I am mentally incapable of making decisions about health treatment?

Health practitioners cannot treat you without your consent. If they decide that you are incapable of making decisions about your treatment, then they must get the consent of your substitute decision-maker. This means your attorney or other substitute decision-maker cannot make treatment decisions for you unless a health practitioner first decides that you are incapable of making them yourself.

There are many different types of health practitioners, such as doctors, nurses, dentists, physiotherapists, occupational therapists, psychologists, and psychiatrists.

Who decides that I am mentally incapable of making decisions about a long-term care facility?

Someone called an "evaluator" decides whether you are capable of making your own decisions about entering a long-term care facility. An evaluator must be a nurse, doctor, psychologist, occupational therapist, social worker, physiotherapist, speech language therapist, dietician, or audiologist.

Your attorney cannot make these decisions for you unless an evaluator finds that you are incapable of making them yourself.

How will my attorney make decisions for me if I become mentally incapable?

If you express wishes about your personal care, your attorney must follow them if you become incapable, if they apply to the decision that your attorney must make on your behalf. The wishes must have been expressed voluntarily when you were still capable and at least 16 years of age.

The wishes may be included in your Power of Attorney for Personal Care or in a separate document, or you may have expressed them orally or by any means that you use to communicate, such as through a communication board.

Wishes about health care are often called "advance care plans" because these are wishes expressed by you in advance of when decisions about treatment or other health care need to be made. These wishes can help guide your attorney or anyone else who may need to act as your substitute decision-maker for health care if you become mentally incapable and unable to make health care decisions for yourself.

No matter what form any advance care plan about health care takes, it is **not** for doctors or medical staff to follow. It is for your Attorney for Personal Care, or other substitute decision-maker, to follow when deciding whether to consent to particular treatments or other health care.

If your attorney does not know of any wishes, or you did not give any, they must make decisions based on what is in your best interest. They must consider your values and beliefs and even the wishes you expressed after you became incapable.

Your attorney must weigh the probable benefits and risks of any decision. They must decide if a treatment, type of care, or course of action will improve your quality of life, or prevent or slow its deterioration. Your attorney must decide if the benefit to you outweighs the risk.

Your attorney might also decide that you would want to change a wish if you were still mentally capable. For example, your Power of Attorney for Personal Care might say that you do not want to enter a particular care facility or receive a particular treatment. However, the facility or treatment might have improved after you signed that. If your attorney believes that you would now feel differently, they can apply to the Consent and Capacity Board for an order allowing them to go against your stated wishes. But your attorney must convince the Board that you would probably have changed your mind if you were still mentally capable.

What if I am mentally capable of making some personal care decisions?

Your attorney can only make decisions for you that you are not capable of making yourself. For example, if you are capable of making decisions about your diet and hygiene but not about your health care, your attorney can make decisions **only** about your health care.

Do I have to be mentally capable when I sign a Power of Attorney?

Yes. You must be mentally capable when you sign your Power of Attorney. You are considered mentally capable and able to sign if:

- ✔ you understand whether the person you name as your attorney is truly concerned with your well-being, and
- ✔ you understand that you may need this person to make decisions for you.

Can someone make a Power of Attorney for me if I become mentally incapable?

No. Only you can make a Power of Attorney. A document that claims to be a Power of Attorney that is signed after you become incapable, or that is signed by someone else on your behalf, is **not** valid.

Where can I get a form for the Power of Attorney for Personal Care?

Your lawyer can prepare a form with you. Or you can use the form published by the Office of the Public Guardian and Trustee.

To order a copy, call **416-314-2800**, or toll-free **1-800-366-0335**. You can also download it by going to this website: **www.attorneygeneral.jus.gov.on.ca**.

Whether you use the form provided by the Office of the Public Guardian and Trustee or another form, it is a good idea to consult a lawyer or community legal worker before appointing an attorney.

You may also want to talk to your doctor or other health practitioner about health and treatment instructions before preparing your Power of Attorney for Personal Care.

Before signing this document, there are many things you need to know about how it might be used.

Is there anyone I cannot name as my attorney?

You **cannot** name someone who is:

- ✘ mentally incapable,
- ✘ under 16 years of age, or
- ✘ paid to give you health care or residential, social, support, or training services (unless this person is your spouse, partner, or relative).

When talking about Powers of Attorney for Personal Care, a person is your "spouse" if any of the following things are true:

- you are married to them,
- you have lived together common-law for at least a year,
- you have a written cohabitation agreement with them, or
- you have a child together.

And, a person is your "partner" if you have lived together for at least a year and you have a close personal relationship of primary importance to both of you.

"Spouse" and "partner" can have different meanings in other areas of law.

Can I name more than one attorney?

Yes. But if you name more than one person as your attorney, all your attorneys must agree before a decision can be made on your behalf unless you state otherwise. When two or more attorneys must agree on a decision, they are said to act "jointly". When the Power of Attorney document says that they can make decisions together **or** separately, they are said to act "jointly and severally".

> **Example:** Suppose you live alone and have been in an accident. You need a care facility but you are now mentally incapable of choosing the facility you prefer. Your Power of Attorney for Personal Care names your two friends, Paul and Susan, as your attorneys for all personal care decisions. But now Paul is away on holidays and cannot be reached. If your Power of Attorney says that Paul and Susan must make decisions **jointly**, Susan cannot act alone.
>
> However, if your Power of Attorney says they can make decisions both **jointly and severally**, Susan can act for you right away. Even if Paul and Susan are both available, one or the other can still act alone. Or they can discuss the situation and make a decision together on your behalf.

If you do want more than one attorney, think carefully about whether your attorneys should act jointly or not. Make your decision clear in your Power of Attorney document.

What if my attorney cannot or will not act for me when the time comes?

When you make your Power of Attorney, you can name a "substitute attorney". This person can act for you if your first attorney or attorneys are not willing or not able to act. The substitute attorney will have the same powers as the original attorneys.

You can also name more than one substitute attorney.

Do I need witnesses when I sign a Power of Attorney for Personal Care?

Yes. The law says you need two witnesses. Both must be with you when you sign, and they must also sign. The following people **cannot** be witnesses:

- ✘ your spouse or partner, child, or someone you treat as your child,
- ✘ your attorney, or your attorney's spouse or partner,
- ✘ anyone under the age of 18,

- ✗ anyone who has a "Guardian of Property" appointed for them by a court because they are not mentally capable of managing their property,
- ✗ anyone who has a "Guardian of the Person" appointed for them by a court because they are not mentally capable of making their own personal care decisions.

Can I cancel my Power of Attorney after I have signed it?

Yes. As long as you are mentally capable of making a Power of Attorney for Personal Care, you can take it back (cancel or revoke it). To do so, state in writing that you revoke it. Two people must witness you signing this statement. Both people must be with you when you sign. The same people who are not allowed to be witnesses for a Power of Attorney are also not allowed to be witnesses for this statement. There is no special form for this statement, which is referred to as a "revocation".

It is a good idea to give a copy of the revocation to anyone who has seen or has a copy of the Power of Attorney. If you can, get the original Power of Attorney back and destroy it.

> **Note:** If you make a new Power of Attorney for Personal Care, all other existing Powers of Attorney for Personal Care that you have made before are automatically cancelled, unless the new one says otherwise. If you do not want this to happen, talk to a lawyer about the wording of the new document.

When does my Power of Attorney for Personal Care end?

It ends when you die, or:

- when your attorney dies, becomes incapable, or resigns, unless you named more than one attorney or you named a substitute,
- when a court appoints a Guardian of the Person for you,
- when you sign a new Power of Attorney for Personal Care, unless the new one says that you want more than one Power of Attorney for Personal Care, or
- when you revoke the Power of Attorney while you are still mentally capable.

What if I do not have a Power of Attorney for Personal Care?

If you have not made a Power of Attorney for Personal Care and you become mentally incapable of making personal care decisions, the Health Care Consent Act allows other substitute decision-makers to make **some** of these decisions. These include decisions about health treatment, admission to a long-term care facility, and personal assistance services such as bathing. The other substitute decision-makers are usually family members.

For example, if you become mentally incapable of making a decision about surgery, your doctor must get your substitute decision-maker's consent before proceeding. If you do not have an Attorney for Personal Care or a Guardian of the Person (see page 19) or they are not available, your doctor must try to get consent from one of the following:

- ✔ Your "representative". A representative is someone appointed by the Consent and Capacity Board to make decisions about your treatment, admission to a long-term care facility, or personal assistance services in a long-term care facility. Anyone, including your family or friends, can apply to become your representative, or you can apply to have someone appointed.

- ✔ Your spouse or partner.
- ✔ Your child if they are at least 16 years of age.
- ✔ Your parent.
- ✔ Your brother or sister.
- ✔ Any other relative.
- ✔ The Office of the Public Guardian and Trustee.

Your doctor must start with the first person on this list. If there is no such person or if this person is not able, willing, and available to make the decision on your behalf, your doctor must ask the next person on the list.

So if you do not want this list to determine who will be your substitute decision-maker, make a Power of Attorney for Personal Care to name the person you prefer.

What is a Guardian of the Person?

A Guardian of the Person is someone authorized by a court to make personal decisions for you if you are not mentally capable of making them yourself.

Your Guardian must stay in contact with you, consult with you, and try to help you understand the decisions they make for you. Their responsibility is to make the decisions you would make for yourself. If what you would want is not clear, your Guardian must make decisions based on what they believe is best for you.

Can anyone become my Guardian of the Person?

No. Someone who is paid to give you health care or residential, social, training, or support services, cannot become your Guardian unless:

- they are your spouse, partner, relative, Guardian of Property, Attorney for Personal Care, or Attorney in a Continuing Power of Attorney for Property, or
- the court decides that there is no other suitable person, such as a friend or relative, who is willing and able to act as your Guardian of the Person.

Is it true that a court can appoint a Guardian even if I already have given a Power of Attorney for Personal Care?

Yes, but that rarely happens. If you have an Attorney for Personal Care it usually means there is no need for a Guardian.

However, things can go wrong. For example, your attorney might not follow your wishes or act in your best interest. If you are no longer capable of revoking the Power of Attorney or of naming someone else as your attorney, a friend or family member could apply to a court to become your Guardian of the Person. If the court agrees, your Guardian would take over from your attorney.

Getting legal help

For legal advice or help with a Power of Attorney for Personal Care, contact a lawyer.

Some community legal clinics may be able to give you free legal advice about your Power of Attorney for Personal Care. To find the clinic that serves your area, you can go to the Legal Aid Ontario website or call them:

Website ..... **www.legalaid.on.ca/en/contact**

Toll-free..... **1-800-668-8258**

Toll-free TTY..... **1-866-641-8867**

TTY, Toronto area **416-598-8867**

This booklet gives only general information. You should get legal advice about your own situation.

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