# Substitute Decisions

excerpts from Dawn Dudley Oosterhoff, “Powers of Attorney” in AH Oosterhoff, Oosterhoff on Wills and Succession, 7th ed. (Toronto: Thomson Carswell, 2011); 6th ed. (Toronto: Thomson Carswell, 2007) 925-978; 5th ed. (Toronto: Thomson Carswell, 2001) 857-935. Reviewed by W Griesdorf, (2002) 21 Estates, Trusts and Pensions Journal 173-176 at 175.

# Substitute Decision-Makers

This chapter addresses certain kinds of actions that have become part of the typical estate practice but are not, themselves, testamentary. These actions are appointments of substitute decision-makers by clients.[1]

Most commonly, substitute decision-makers are representatives – usually referred to as "attorneys" – appointed by powers of attorney. A power of attorney is a document that confers upon another (the attorney) an authority or power to act on behalf of the person granting the authority (the grantor or donor). A power of attorney serves as a document that an attorney may produce to verify his or her authority to act with third parties on behalf and in the name of the grantor of the power.

It has long been possible to appoint an attorney to make financial and property decisions on behalf of an individual while the individual is alive and retains mental capacity. But our population is aging, people are living longer but sometimes compromised lives, and decision-making has become more complex with greater options to choose from. As a result, people have become more concerned about what might happen to their property and themselves once they lose the mental capacity to make their own decisions. Legislation introduced a decade ago and refined over the last years addresses these concerns. We shall consider the following Ontario statutes: *Substitute Decisions Act, 1992*;[2] *Health Care Consent Act, 1996*;[3] *Mental Health Act*;[4] and *Powers of Attorney Act*.[5] Whenever possible and relevant, legislation from other provinces will be referred to.

Although the law of substitute decisions is no longer new or novel, it remains very much a work in progress. The provincial substitute decision-making laws are not perfect. Conflicting opinions abound as a result of still untried aspects of the legislation and continual evolution of complex family and care arrangements. However, despite the idiosyncrasies and blips, the legislation is effective in providing individuals with the opportunity to choose how their affairs shall be governed if they should become incapable.

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1 "Substitute decision-maker" is the generic term identifying the individual specified by legislation, appointed by a board or court, or named in a power of attorney to make decisions on behalf of another person. It should never be assumed that the closest relation to a person is the substitute decision-maker by virtue of his or her relationship with the person.

2 S.O. 1992, c. 30.

3 S.O. 1996, c. 2, Sched. A.

4 R.S.O. 1990, c. M.7.

5 R.S.O. 1990, c. P.20.

# Incapacity and Substitute Decision-Making

At an earlier time, a person in a state of being incapable of making his or her own decisions could have been labelled an "imbecile," "idiot," "lunatic," or "of unsound mind," or something similar. In the more recent past, the designations "competent" and "incompetent" were used to denote whether a person was capable of making his or her own decisions. However, the competent/ incompetent designation had a number of problems, most notably that only one or the other state was possible. A person was competent if he or she was of legal age without mental disability. Either a mental disability or lack of legal age resulted in a finding of incompetence. A finding of incompetence usually rendered the person incapable in law of making *any* decisions.

In keeping with the general trend to foster individual autonomy and preserve a person's own decision-making rights whenever possible, the *Ontario Substitute Decisions Act* and the *Consent to Treatment Act*[1] (the precursor to the *Health Care Consent Act*) introduced the concept of "capacity." The change in terminology was meant to signal a change in philosophy. Although capacity, like competence, is still a concept that seems to evade clear definition, the legislation does make a good attempt. More important, the scheme accommodates varying degrees of capacity and fosters a person's participation in decision-making to the extent of his or her ability.

The legislative emphasis on assessing capacity relevant to "a decision" in combination with the legislative directives to involve the capable person in decision-making as much as possible correlates with the modern clinical understanding of capacity. The modern concept of capacity is task and time specific, that is a person's capacity to make decisions may vary depending upon the complexity or type of decision, and the point in time at which a person is asked to decide. While the actual assessment of a person's capacity to make certain decisions may, at times, be sophisticated, the assessment will always be based on a development of the following two questions:

Does the person understand the information that is relevant to making the decision?

Does the person appreciate the reasonably foreseeable consequences of the decision being made?

On some occasions, the law requires that a person's age be considered in the determination of capacity. However, it is important to note that the occasions when age must be considered are limited. For the most part, age is a factor when other legal acts that carry age restrictions themselves are associated with the decision relevant to the assessment of capacity.[2]

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1 Consent to Treatment Act, 1992, S.O. 1992, c. 31; repealed S.O. 1996, c. 2, s. 2(2).

2 See, for example, ss. 4 and 5 of the Substitute Decisions Act, which require the grantor of a power of attorney and the attorney named in the power to be at least 18 years of age.

# Powers of Attorney for Personal Care

While there are alternatives for substitute decision-making for personal care, some easier than powers of attorney, the most flexible and personal option is, by far, a power of attorney for personal care. A power of attorney for personal care allows the grantor to name the person he or she chooses to make personal care decisions on his or her behalf when the grantor is no longer capable of making those decisions. The grantor can also include directions in the document about how those decisions should be made.

A well-drafted power of attorney for personal care will name who is to act as substitute decision-maker, specify how the attorney or attorneys are to act and how capacity of the grantor will be assessed when the time comes, and give clear directions on how the power of substitute decision-making is to be used. The legal requirements are minimal: a grantor capable of granting the power, a named attorney (or attorneys), a statement that the attorney has the power to make personal care decisions on the grantor's behalf should she be incapable of doing so, the grantor's signature, the date, and the signatures of two qualifying witnesses.

The creation of a power of attorney for personal care is governed by the *Substitute Decisions Act*, particularly sections 46 and 48.

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In some circumstances, it may be appropriate for the grantor of a power of attorney for personal care to enter into a binding agreement with the attorney, limiting the grantor's ability to object to the attorney's actions once the grantor becomes incapable. These provisions, often referred to as Ulysses agreements, may be particularly helpful for persons who suffer episodic psychiatric disorders, the nature of which leads a person to deny the very treatment she needs to recover. Drafting such an agreement is anticipated by the *Substitute Decisions Act*, section 50.

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## Notes and Questions

1. The grantor does not have to be capable of making decisions about his or her own personal care in order to grant a power of attorney. Rather, the grantor need only understand whether the proposed attorney is genuinely concerned about the grantor's welfare and that the proposed attorney may need to make decisions on the grantor's behalf (*Substitute Decisions Act*, s. 47). However, if the power of attorney for personal care contains any directions or instructions ("advance directives"), the grantor must be capable at the time of drafting those instructions of making those decisions (ss. 44, 53).

2. Making treatment decisions with and for persons suffering with mental disorders may be complex and challenging. In *Starson v. Swayze*,[1] the patient was an exceptionally intelligent scientist who suffered from a bipolar affective disorder and spent time in mental health care institutions over the years. He was ultimately detained in an institution when he was found not criminally responsible because of mental disorder on two counts of uttering death threats. The treating psychiatrists proposed to treat the patient's disorder with a combination of medications. The patient refused the treatment, recognizing that he suffered with a mental illness but did not want to endure the negative effect of the proposed treatment on his work. The Consent and Capacity Board found the patient incapable, allowing the substitute decision-maker to consent to the treatment. Subsequent review by the Ontario Superior Court concluded that the patient was capable and, therefore, could refuse the treatment. The Court of Appeal and then the Supreme Court of Canada upheld the lower court's decision.[2]

3. The restrictions on who may be an attorney under a power of attorney for personal care are few: the attorney must be at least 16 years of age and capable of making personal care decisions. As a practical matter, should an attorney demonstrate more maturity than an average 16 year old? Does making treatment decisions for another person require more objectivity and equilibrium than a 16-year old might possess?

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1 Starson v. Swayze (2003), 225 D.L.R. (4th) 385 (S.C.C.).

2 See also Conway v. Jacques (2002), 214 D.L.R. (4th) 68 (Ont. C.A.).

# Advance Directives

One of the most important reasons for granting a power of attorney for personal care, if not the most important reason, is the opportunity it affords the grantor to express any wishes or instructions he or she might have about treatment. Often, and mistakenly, referred to as "living wills," advance directives are guidelines that direct an attorney when making decisions on the grantor's behalf. Often, but not necessarily, advance directives form part of a power of attorney for personal care (acting as an equivalent to conditions and restrictions in a power of attorney for property). Directives for personal care decisions may be also be drafted in a separate document that accompanies a power of attorney for personal care, or exist as a separate document *without* an accompanying power of attorney for personal care. The directives may also be expressed orally or in any other manner. In all of these cases, the directives are binding.[1]

## Notes and Questions

1. How would you interpret the following directive?

> I do not wish to have my life unduly prolonged by any course of treatment or any other medical procedure which offers no reasonable expectation of my recovery from life threatening physical or mental incapacity, except as may be necessary for the relief of suffering.

2. Poorly drafted advance directives can cause more problems than they were meant to address. In some cases, the problem is a result of health care practitioners falsely believing that advance directives are meant to be a replacement for direct communication between the patient and the practitioner. Rather, advance directives are meant to guide the substitute decision-maker in making decisions and communicating with the practitioner on the patient's behalf.[2]

3. Many provinces require that both the proxy (power of attorney) and advance directives be in writing, signed, and witnessed. Ontario only requires that a power of attorney be in writing, allowing advanced directives to be expressed orally or in any other manner. What are the advantages and disadvantages of insisting upon advance directives in writing?

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1 The Ontario legislation is unusual in permitting binding advance directives to be expressed orally or in some other manner (for example, on a Bliss Board – a communication device for those who lack the ability to speak). The legislation in Alberta, British Columbia, Manitoba, Newfoundland, and Prince Edward Island all specifically require advance directives to be in writing, signed, and witnessed.

2 See Michael Gordon and Dan Levitt, "Acting on a Living Will: A Physician's Dilemma" (1996), 155 Canadian Medical Association Journal 893; Brian F. Hoffman and Anne-Marie Humniski, "Advance Direcctives: Principles, Problems, and Solutions for Physicians" (1997), 30 Annals of the Royal College of Physicians and Surgeons of Canada 169; and Peter A. Singer et al., "Reconceptualizing Advance Care Planning from the Patient's Perspective" (1998), 158 Archives of Internal Medicine 879; E.D. Pellegrino, "Decisions to Withdraw Life-Sustaining Treatment: A Moral Algorithm" (2000), 283(8) Journal of the American Medical Association (JAMA) 1065-1067; R. Gallagher, "An Approach to Advance Care Planning in the Office" (2006), 52 Canadian Family Physician 459-464.

4. Many lawyers are uncomfortable when assisting their clients with advance directives. This is understandable given that most lawyers are not medically trained. As well, a discussion of wishes regarding personal care takes the lawyer into a personal realm that few would wish to enter. One solution to this dilemma is to draft the power of attorney for personal care noting only conditions and restrictions that pertain to the legal use of the power. Clients can then be advised and encouraged to discuss wishes regarding personal care with their family members and physician, making note of their wishes and attaching those notes to the power of attorney. This course of action ensures that clients take full advantage of the benefits of a power of attorney for personal care but does not bind the lawyer into providing advice in an unknown realm. Lawyers can even go one step further by providing their clients with any one of the various tools available to guide individuals through the process of discerning their wishes regarding personal care.

5. There is any number of kits available for preparing advance directives or "living wills." Many of them are available on the Internet for free or for a small price. While some of these documents may prove useful in helping a person focus his or her thoughts, many are legally problematic and may inadvertently void a person's power of attorney for personal care.[3]

6. Clients may also want to include in their power of attorney conditions or restrictions other than advance directives. Examples of such restrictions include limiting the attorney's ability to act in certain circumstances until a confirmation of incapacity has been obtained. As well, some method of assessing the grantor's capacity may be advisable because a power of attorney for personal care only becomes effective upon the grantor's incapacity.

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3 For an example of the documents, both good and bad, that are readily available, see The Joint Centre for Bioethics at http://www.jointcentreforbioethics.ca/tools/livingwill.shtml; Ministry of the Attorney General, British Columbia at http://www.ag.gov.bc.ca/legislation/pdf/Consultation/Q002095_Advance_Directive.pdf; MegaDox at http://www.megadox.com/c/1690; Palliative Info at http://palliative.info/resource_material/PalliativeInfoHealthCareDirective.pdf; Living Wills Registry of Canada at http://www.sentex.net/~lwr/; D. William Molloy and V. Mepham, Let Me Decide: The Health Care Directive that Speaks for You When You Can't (Toronto: Penguin Books, 1992); M. Stephen Georgas, Power of Attorney Kit: A Do-It-Yourself Guide (Vancouver: Self-Counsel Press, 1998); and Linda L. Emanuel & Ezekiel J. Emanuel, "The Medical Directive: A New Comprehensive Advance Care Document" (1989), 261 Journal of the American Medical Association 3288, reprint (1990-91), 10 E.T.J. 134.

# Sample

# Power of Attorney for Personal Care

# Power of Attorney for Personal Care of [NAME]

This Power of Attorney for Personal Care is given by [NAME] of the City of [PLACE], in the province of Ontario.

**REVOCATION**

1. I hereby revoke any prior power of attorney for personal care or any prior power of attorney that affects my personal care previously given by me.

**APPOINTMENT**

2. I appoint [PERSON TO BE ATTORNEY] use if appointing two attorneys: and [OTHER PERSON TO BE ATTORNEY] jointly OR jointly and severally to be my attorneys for personal care in accordance with the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30. I will refer to my attorney or attorneys for personal care as my "Attorneys."

**SUBSTITUTION**

3. I have appointed my Attorneys to act jointly and severally. If one of my attorneys is unavailable or cannot or will not be my attorney because of refusal, resignation, death, mental incapacity, or removal by the court, I authorize the remaining attorney to act solely OR [NAME OF OTHER PERSON TO BE ATTORNEY] to act solely. Written notification to any person by my remaining attorney as to the inability or refusal of the other attorney to act shall be sufficient and conclusive evidence of the fact.

**CONTINUING POWER**

4. It is my intention and I so affirm that this authority shall be exercised by my Attorneys during any incapacity on my part to manage my personal care.

**AUTHORIZATION**

5. In the full knowledge that my Attorneys will act in accordance with the wishes I have and will express, I authorize my Attorneys to make on my behalf any decisions concerning my personal care, and to give or refuse consent on my behalf to any treatment to which the *Health Care Consent Act, 1996*, S.O. 1996, c.2, Sch. A applies.

**REIMBURSEMENT FOR EXPENSES**

6. All expenses incurred by my Attorneys in carrying out their duties (including obtaining an assessment of my capacity, if required), shall be payable by me or my attorneys for property out of my assets.

**SPECIFIC INSTRUCTIONS**

7. This power of attorney for personal care is subject to any advance directives that I have outlined, will outline in subsequent documents in the future, or express verbally. I trust my Attorneys to use any

such directives as guidelines wisely and with integrity, varying from my directives if, when applied to individual circumstances, they no longer reflect my underlying values and beliefs.

a) [ANY CARE WISHES; E.G., Should my life deteriorate to what I would consider an unacceptable quality, I do not wish to be kept alive artificially or mechanically for an extended period of time. In these circumstances I would want human attempts to prolong or preserve my life to cease and nature allowed to take its course; and I would only want such life-sustaining measures carried out if there is reasonable hope that I can be returned to a life of acceptable quality as I have defined it. At all times, I would expect that any and all reasonable efforts would be employed to control any pain I might be experiencing. An unacceptable quality of life would include:

   i) a debilitating illness or injury with no foreseeable cure;

   ii) intractable pain;

   iii) total and complete loss of physical mobility such that I am confined to bed and can no longer assist in my own care;

   iv) persistent dependency on mechanical technology for sustaining my life; and/or,

   v) an inability to interact with others.]

b) Instructions Regarding Organ Donation and Research: I am aware that according to the *Trillium Gift of Life Network Act*, R.S.O. 1990, c. H-20, if I am incapable of making the decision regarding donation of my body and/or organs for transplantation and/or research and my death is imminent, my next-of-kin as defined by s. 5(2) will be responsible for making that decision on my behalf. Here, in this power of attorney, I elect to make it clear to my next-of-kin that notwithstanding the Trillium Gift of Life Network Act, I would like my Attorneys to make any decision regarding donation of my body and/or organs. Should my next-of-kin's consent be required nonetheless, I ask him or her to adhere to my wishes.

   i) It is my wish that my body or any part of my body [not] be used for the purpose of organ donation for transplant, research, or medical education.

   ii) Instructions Regarding Care of My Body after Death: I am aware that, legally, my Estate Trustee as appointed in my Will is responsible for making any decisions regarding my body after death. I request that my Attorneys work with my Estate Trustee to carry out my wishes, namely:

   iii) That funeral arrangements be carried out at ...;

   iv) That I be cremated/buried ... .

**POWER OF APPOINTMENT**

8. Limited Power of Appointment: I hereby grant to my Attorneys the power to appoint one or more attorneys under them for any period of time, for an unlimited period of time, or from time to time for the limited purpose of substituting for my Attorneys during their inability to act. My Attorneys may so appoint attorneys without in any way reducing or suspending my Attorneys' own power of authority granted under this power of attorney for personal care. My Attorneys shall remain responsible for overseeing the actions of any appointed attorneys. My Attorneys shall have discretion to revoke any such appointments.

**COMPENSATION**

9. I authorize my Attorneys, and my Attorneys have agreed, to accept no compensation for any work done by my Attorneys pursuant to this power of attorney for personal care.

**AFFIRMATION**

10. In granting this power of attorney for personal care, I affirm that I am aware:

a) that my Attorneys have a genuine concern for my personal welfare;

b) that my Attorneys will be required and will be able to make personal care decisions on my behalf should I be unable to do so myself;

c) that my Attorneys must be able to account for decisions made on my behalf;

d) that there is a possibility that my Attorneys could misuse the authority given under this power of attorney for personal care; and

e) that I may, while capable, revoke this power of attorney for personal care.

**DATE OF EFFECTIVENESS**

11. This continuing power of attorney will come into effect upon my incapacity to manage my personal care myself. My incapacity to make decisions regarding treatment as defined by Section 2 of the Health Care Consent Act, 1996, S.O. 1996, c.2, Sch. A shall be determined in accordance with that Act. For all other purposes, my capacity to make decisions regarding my personal care shall be determined by my Attorneys.

**EXECUTION**

12. Executed at the City of [CITY], in the province of Ontario, this [DAY] day of [MONTH], 20[YY] in the presence of both witnesses, each present at the same time.

13. In witness whereof, I have signed my name to this power of attorney for personal care, written upon this page and initialled upon the preceding [X] pages.

)
_____ )
[PERSON] )

**WITNESSES**

14. We are witnesses to this power of attorney for personal care. The grantor of this power of attorney for personal care has signed this document in the presence of both of us and we have each signed this document in the presence of the grantor and each other on the date shown in the paragraph above. Neither one of us is an attorney named in this power of attorney for personal care; a spouse or partner of the named attorneys; a spouse, partner, child of the grantor or someone who the grantor treats as her child; a person whose property is under guardianship or who has a guardian of the person; or, a person under the age of 18 years.

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_____ )
[WITNESS] )

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_____ )
[WITNESS] )