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Creating a Power of Attorney for Personal Care in Ontario: What you Need to Know

This article discusses the issues you need to consider when creating a Power of Attorney for Personal Care in Ontario.

A Power of Attorney for Personal Care, along with a Will and a Power of Attorney for Property, make up the basic estate document package in Ontario. You can access our Blog article which discusses creating these documents by visiting our web-page, or you can email us your request and we will send you a scanned copy of the document to you by return email.

Why do you need a Power of Attorney for Personal Care?

A Power of Attorney for Personal Care is a legal document that allows an Ontario resident to appoint a substitute decision maker for personal care to make decisions on medical treatment the grantor wishes to be subject to if the grantor cannot personally instruct one or more medical professionals. The power granted may only be exercised during a period subsequent to its creation where the grantor lacks legal capacity, and the grantee of the power is obligated to follow the instructions of the grantor which may be expressed in the actual power of attorney document, or in a collateral document created by the grantor after the signing of the original document.

Unlike a continuing power of attorney for property, it is not necessary to specify that the power granted can only be exercised during the grantor's subsequent incapacity, and in fact, the power granted only takes effect if the grantor is no longer capable of making the decision.

How do you Create a Power of Attorney for Personal Care?

The Ontario statute that allows the creation of powers of attorney for personal care in Ontario is

called the Substitute Decision Act. (the "SDA"). Part II of the SDA specifies how to legally create a power of attorney for personal care. In summary, the SDA provides as follows with respect to creating these documents:

- you can appoint the Office of the Public Guardian and Trustee as your attorney, but must get their consent to do so (S. 46 (2)). This might be appropriate if you do not have anyone else you are comfortable with appointing as your attorney for personal care;
- a person who provides health care services to you for compensation cannot be your attorney for personal care (unless that person is your spouse, partner, or a relative; S. 46(3));
- you must be at least 16 years old to create an attorney for personal care and have the ability to understand that the person being appointed may need to make decisions for your personal care needs;
- you can appoint more than one attorney to act jointly, and if one appointee predeceases or cannot act for any reason, the appointment of the other(s) remains valid S. 46 (5). Where a joint appointment is made the attorneys must act unanimously:
- you can set out conditions and instructions in the power of attorney which must be followed by the appointed attorney. Given personal care includes decisions with respect to health care, nutrition, shelter, clothing, hygiene, or safety, the document can be used to provide instructions to the appointed attorney(s) on all of these issues; S. 46 (6) and (7);
- The document does not need to have any particular form (S. 46 (8), but must be witnessed by two people both of which must be at least 18 years old, and neither of which can be your spouse or partner or your child, or the appointed attorney's spouse or partner (S. 48 (1).

Part II of the SDA deals with many other issues relating to these documents, including issues relating to how legal incapacity is to be determined which are beyond the scope of this article. However, to find out more on these issues you can access this statute at the following link: https://www.ontario.ca/laws/statute/92s30

What Other Issues are relevant to creating a Power of Attorney for Personal Care?

One fact that people are often surprised by is that there are no legal restrictions on the number of personal care attorneys one may appoint, or on their combined or individual areas of authority. As such you in theory can appoint multiple attorneys for personal care to deal with different areas of your preferred healthcare choices.

You can also appoint multiple attorneys whose authority to act is "joint and several". This type of appointment allows the persons appointed to act together or independently. While it provides greater flexibility in the decision-making process including dealing with situations where one or more appointed joint attorneys do not live in the same jurisdiction as the grantor, the use of a "joint and several" appointment can create other difficulties if the appointed attorneys disagree about a particular course of action. This is because each appointed attorney has individual authority to make and implement decisions that may be contradictory to decisions that other

jointly appointed attorney wishes to make. Clearly, if you are going to make a "joint and several" appointment, you want to make sure all the attorneys appointed get along and have a clear understanding of your wishes with respect to ongoing healthcare decisions.

One mechanism that can be employed when more than one attorney for personal care is being appointed is to consider using a "majority rules" clause. This is an easy way to avoid deadlocks and ensure consultation between the appointed attorneys. However, it should be applicable to all decisions and not just decisions where a disagreement exists to avoid the necessity of producing "third-party evidence" of a disagreement before being able to exercise the power.

Another issue that you should consider is whether to appoint the same person as your attorney for property and your attorney for personal care. The advantages of appointing the same person(s) to include simplicity and consistency, as both types of decision-making are vested in the same person(s). However, on the flip side appointing different persons will effectively create a "sounding board" where one person has control of the finances and can ensure that any personal care decisions are being made prudently.

However, you don't want your attorney for property to "cheap out" on the cost of various treatment options and withhold money from your attorney for personal care. The SDA addresses this issue by requiring the attorney for property to be cognizant of and take into account your personal comfort and well-being when making decisions. You can also include a clause in your attorney for property expressly directing your appointee to use the assets under his or her control to provide the funds necessary to pay for the treatment choices for you that your attorney for personal care has chosen.

Another issue that has received a great deal of attention in recent years is the "end-of-life" decision. Many powers of attorney for personal care include what is sometimes referred to as a "pull the plug" clause. This clause effectively states that if your appointed attorney is advised by at least two competent medical professionals that you will not recover from what you are suffering from, your directions are not to be kept alive by "artificial means".

Much debate has occurred recently as to whether this type of clause should be included. The discussion surrounds what is meant by "artificial means". Another option is that you leave the end-of-life decisions to the discretion of your appointed attorney(s). This type of clause does not tie their hands by having to comply with an undefined term like "artificial means", and allows them to make these difficult decisions with only your wishes which you can express to them in advance, and your best interests, to guide them.

Is your Power of Attorney for Personal Care Entitled to Compensation?

Section 90 (1) provides that the legislature may enact regulations setting what compensation attorneys of personal care are entitled to. However, as of today, no such regulations have been enacted. The end result is that there are no clear guidelines as to the compensation payable to

attorneys for personal care. Such guidelines do exist for compensation payable to attorneys for property. Although the Courts have awarded compensation to attorneys for personal care in some circumstances, the process of determining the amount of compensation is expensive, time-consuming, and uncertain.

The best practice is that if compensation is intended, it is preferable to specify what that compensation will be in the document itself. A reasonable option is to specify an hourly rate for services rendered plus disbursements incurred to be paid by the attorney for property to the attorney for personal care at specified intervals.

Key Takeaway

The basic estate package in Ontario for every individual consists of a Will, a Power of Attorney for Property, and a Power of Attorney for Personal Care. Having a lawyer create these documents for you is not expensive. However, if you do not have these documents in place when they are needed, or your wishes are not clearly expressed, the cost can be significant to have the legal authority these documents grant determined by a judge on application to a court.

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